TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~458.~~ 213

THE NEW YORK LIFE-INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

HENRIETTA HENDREN.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED JULY 31, 1874.

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1 To the honorable the Chief-Justice of the Supreme Court of the United States:

The petition of the New York Life-Insurance Company respectfully shews:

1. That Henrietta Hendren, who is and was at the time of suit brought a citizen of the State of Virginia, brought suit in the court of the corporation of the city of Norfolk, one of the courts of said State of Virginia, against the petitioner, which is a corporation duly incorporated by the State of New York, and for the purposes of the jurisdiction of the courts of the United States, a citizen of said State of New York.

2. That such proceedings were had in said case that a judgment was rendered in said court at Norfolk against the petitioner.

3. That thereupon the petitioner obtained a writ of error & removed the case to the supreme court of appeals of the State of Virginia.

4. That said court thereupon affirmed the judgment of said court at Norfolk.

5. That said court of appeals of Virginia is the supreme or
2 highest court of said State in which a decision in said case could be had.

6. That there is manifest error in the judgment of the said supreme court of appeals of the State of Virginia, as appears by a copy of the record thereof, which is herewith submitted for the better understanding by your honor of what points of law and questions of facts or issues were involved therein.

7. That the petitioner now desires to obtain a writ of error to said supreme court of appeals of the State of Virginia to remove the record of said case to the Supreme Court of the United States, there to be reviewed according to law, and prays your honor to allow the said writ.

8. That the petitioner assigns for error: (1.) That the said supreme c't erred in its judgment and rulings upon the first, second, third, fourth, & fifth pleas (pages 8, 9, 10 of printed record) of the petitioner, and the demurrers to its sixth and seventh pleas, (pages 9, 10, 11.) (2.) That it erred in its judgment and rulings upon the several instructions
3 requested by petitioner, numbered from 1 to 23, (page 37, &c.)

9. That for causes of error and brief of argument the petitioner refers to the causes of error assigned upon the occasion of the writ of error to the court at Norfolk, as particularly set out at the commencement of said record, & contained in the petition then made; and, for further argument on the questions arising in said record, this petitioner begs leave to refer to the printed opinion of Judge Emmons, in the case of Tait *vs.* The New York Life-Insurance Company, in the circuit court of the United States for the western district of Tennessee, a copy of which opinion is now submitted herewith to your honor, and as to which the petitioner thinks it proper to mention that the Supreme Court of the United States affirmed the judgment by a divided court upon the removal of the record to that court by writ of error.

10. That the petitioner sets forth the grounds upon which the allowance of writ of error is now prayed, as follows:

(1.) That the case is one coming within the jurisdiction of the
4 courts of the United States, because it is a case between citizens of different States, as mentioned in the Constitution, Art. III.

(2.) That, although a right of removal is given in the act of Congress authorizing the same from the inferior State court to the circuit court of the United States for the same district, yet that is not exclusive of the

right of the Supreme Court of the United States to review upon writ of error any case within the jurisdiction of its courts, and it has never been so held or adjudicated by said Supreme Court, which is the exclusive judge of its own powers under the Constitution.

(3.) That the grant of power to said Supreme Court in all the cases mentioned, including the one between citizens of different States, has never been abridged or rejected, or excepted by any act of Congress, the words of said Constitution being as follows, viz:

"In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

In Ex-parte Yerger, (8 Wallace, 85,) the Supreme Court sus-
5 tained its appellate jurisdiction under the general clause of the Constitution, and denied that the jurisdiction of the appellate tribunal, given in such broad, general terms, could be taken away by mere implication, & it is argued here for petitioner that no exception has been made in any act of Congress of this appellate jurisdiction, & hence it remains.

(4.) That the several acts of Congress passed in 1861 & 1862, and the proclamations of the President, made intercourse between citizens of Virginia & New York after the commencement of the rebellion unlawful, & the continuance of any contract void.

See the acts of Congress of 13 July, 1861; 29 July, 1861; 31 July, 1861, & others subsequent, in relation to the insurrection or rebellion. And see Minnesota v. Bachelder, (1 Wallace, 109;) Bridge v. Hoboken, (1 Wallace, 116;) Furman v. Nichols, (8 Wallace, 44;) Maguire v. Tyler, (8 Wallace, 650;) Roosevelt v. Meyer, (overruled;) in Trebilcock
6 v. Wilson, (12 Wallace, 687;) Dooley v. Smith, (13 Wallace, 604;) Delmas v. Insurance Co., (14 Wallace, 661;) Railroads v. Richmond, (15 Wallace, 3;) Hall v. Jordan, (15 Wallace, 393;) Pennywit v. Eaton, (15 Wallace, 380;) Phillips' Practice in Sup. Ct., chapter xiii, pa. 111.

And the petitioner says that, under the judiciary act of Congress of 1867, this case may be re-examined on writ of error in Supreme Court of the United States—

Because the validity of the foregoing statutes & proclamations of the United States were drawn in question, & the decision was against them, in the highest court of the State in which a decision could be had;

And because this petitioner claimed in the suit a privilege and immunity from liability, because of the pendency of the rebellion,
7 under said statutes & proclamation & authority, & under the Constitution of United States*tes*;

And because the validity of the statute of the State of Virginia requiring the petitioner to keep an agent in said State in time of rebellion, was drawn in question, & the decision was in favor of the validity of the statute of said State, although repugnant to the Constitution & laws of the United States, during the rebellion aforesaid.

And the petitioner refers particularly to the demurrers to the 6 & 7 pleas, as hereinbefore set forth, & to the several instructions refused, relating to the war & the effects of it.

And the petitioner refers also to the case of Manhattan Ins. Co. vs. Warwick, (20 Grattan, 621,) affirmed by the ruling of the court in this case, & wherein effect is given to the validity of said Virginia statute.

The petitioner prays the allowance of a writ of error, & that the bond herewith submitted be approved.

EDWARD OTIS HINKLEY,
Attorney for Petitioner, & an Attorney of the Supreme Court of the United States.

8 (Indorsed:) New York Life-Insurance Company vs. Hendren. Petition for writ of error.

Let the writ be issued.
June 29, 1874.

M. R. WAITE,
Chief Justice of the Sup. Ct. U. S.

9 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the supreme court of appeals of Virginia, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between the New York Life-Insurance Company and Henrietta Hendren, a manifest error hath happened, to the great damage of the said New York Life-Insurance Company, as by complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this eighth day of June, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Ea. District of Virginia.

(Indorsed:) No. . United States circuit court, district of Virginia. The New York Life-Insurance Co. vs. Henrietta Hendren. Writ of error. To . Filed , 186'. , clerk.

10 UNITED STATES OF AMERICA, *to wit:*

To HENRIETTA HENDREN, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the court-room in the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of Virginia, wherein the New York Life-Insurance Company, plaintiff, and Henrietta Hendren, defendant in error, to show cause,

if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and seventy-four.

M. R. WAITE,
Chief Justice of the Supreme Court of the United States.

11 UNITED STATES OF AMERICA,
State of Maryland, City of Baltimore, sct.:

Edward Otis Hinkley, being duly sworn, on oath deposeth and saith, that, on the fourteenth day of July, A. D. 1874, he duly served on Albert Ritchie, attorney at law, for Henrietta Hendren, the defendant in error, the within citation by reading the same to and leaving a true copy thereof with him, and that said Ritchie is her attorney of record in this case.

Sworn and subscribed to before me, this 14th day of July, A. D. 1874.

EDWD. S. SIARO,
Justice of the Peace of the State of Maryland, in and for the City of Baltimore.

(Indorsed:) No. . United States court, district of Virginia. The New York Life-Insurance Co. vs. Henrietta Hendren. Citation.

Service of copy admitted 14 July, 1874.

ALBERT RITCHIE,
Atty. for Henrietta Hendren.

Filed , 186'. , clerk.

12 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house in the city of Richmond, on Tuesday, the seventh day of April, 1874.

Be it remembered that, heretofore, came the New York Life-Insurance Company, by its counsel, and presented a petition for a writ of error and supersedeas to a judgment of the corporation court of the city of Norfolk, rendered against it on the 23' day of February, 1871; which petition and the record accompanying the same are in the words and figures following, to wit:

13 Court of appeals of Virginia, Richmond.

THE NEW YORK LIFE-INSURANCE COMPANY, plaintiff, *vs.* HENRIETTA HENDREN, DEFENDANT. } In error.

To the honorable judges of the supreme court of appeals of Virginia:

The petition of the New York Life-Insurance Company, a corporation duly incorporated under the laws of the State of New York, and having its principal office in the city of New York, in the said State, respectfully represents that it is aggrieved by certain rulings and a judgment rendered against it by the corporation court of the city of Nor-

folk, on the 23d day of February, A. D. 1871, at the original suit of Henrietta Hendren, a transcript of the record whereof is herewith exhibited as a part of this petition.

And your petitioner assigns the following causes of error:

1. The court should not have sustained the demurrer to the 6th and 7th pleas of your petitioner, or either of them. (Pp. 10, 11, Record; Prize Case, 2 Black, 635; Alexander's Cotton Case, 2 Wall., 404; The Merchants' Ins. Co. vs. Edmund Davenport & Co., 17 Gratt., 138; 1 Green. on Ev., sec. 5, p. 8; Swinnerton vs. Columbian Ins. Co., 37 N. Y. Rep., 183; 12 U. S. Stat. at Large, 1259, appendix; 2 Bright. Dig. Laws U. S., 193; the Sally Mays, 3 Wall., 451; Cargo of the Emulons, 1 Gall. C. C. R., 571; Willison vs. Patterson, 7 Taun., 438; 1 Phil. on Ins., ed. 1867, sec. 147, pp. 94, 95; 3 Kent's Com., pp. 255, 256; Griswold vs. Waddington, 16 John's R., 438; 1 Duer on Ins., 473; Odlin vs. Penn. Ins. Co., 2 Wash. C. C. R., 321; Gray vs. Lewis, 3 Wash. C. C. R., 280; Lathers vs. Commercial Ins. Co., 2 Bush, 298.)

2. The court erred in admitting the said policy of insurance in evidence and in allowing the amendment to the declaration set forth in the first bill of exceptions. (Pp. 15-18 Record; 1 Chitty Pl., 9th Am. ed., pp. 305, 306, and note 2; 1 Green. on Ev., sec. 56-72; 2 Green. on Ev., sec. 11-13, and 160; Stanwood vs. Scovel, 4 Pick., 422; Sewer vs. Winten, 7 Cow., 263; Whittaker vs. Smith, 4 Pick., 83; Wait vs. Morris, 6 Wend., 304; Conch vs. Hooper, 2 Leigh, 557; 1 Chitty. Pl., 9th
14 Am. ed., 309; Pridge vs. Austin, 4 Mass., 116; 3 Rob. New Pr., 547-8; Rob. New Pr., 254; Robertson vs. Robertson, 3 Ran., 68; Austin's adm'x vs. Whitlock's ex'rs, 1 Mun., 487; Bristow vs. Wright, 2 Dons., 665; 1 Smith's Leading Ca., 901-26; Penny vs. Porter, 2 East, 2; Pitt vs. Green, 9 East, 188; Kinniard vs. Jones, 9 Gratt., 183; Eaton vs. Dugan, 21 Pick., 538; 2 Marshall on Ins., 809; Routledge vs. Burrell, 1 H. Black, 254; 2 Phil. on Ins., sec. 2122, p. 683, 4th ed.; Rawlins vs. Desborough, 8 C. & P. 321.)

3. The court erred in overruling the exceptions taken to the evidence of Mrs. Henrietta Hendren, as set forth in the second bill of exceptions. (Pp. 18, 26, Record; 1 Green. on Ev., sec. 113, and notes and cases; 2 Starkie on Ev., p. 46; Story on Agency, 7th ed., sections 134, 135, 136, 137, 138, and notes; 1 Phil. on Ev., 5th Am. ed., Cown and Hill's notes, pp. 507-513, and notes; Gratt vs. Howard, 8 Bing., 453; Fairlie vs. Hastings, 10 Ves., Jr., Summ. ed., 123, notes and cases.)

4. The court erred in granting the instruction asked for by the said Henrietta Hendren. (Pp. 52, 53, Record.)

5. The court erred in refusing to grant the several instructions asked for by your petitioner, numbered respectively 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 16, 17, 18, 19, 20, 21, 22, and 23, and each of said instructions, and in modifying and granting as modified instruction No. 7. (Pp. 53, 63, Record.) Instructions 1, 10 relate to the agency of R. H. Vaughan, the agreement which Vaughan, as such agent, made with his sister and brother-in-law, that the war dissolved the agency ipso facto; that if the war did not ipso facto dissolve the said agency, the entry of the said R. H. Vaughan into the military service of the Confederate States, and his actually engaging in war against the United States, did dissolve his agency; that the powers of the said agent were local and his removal from the locality of his agency dissolved it; that, by virtue of the agreement made by the said agent, he also became the agent of the said Henrietta Hendren, and as such his declarations did not bind the company; that any declarations made by the said agent by virtue of or in pursuance of said agreement, did not

bind the company, and that the defendant below, your petitioner, could not do by an agent what it could not itself do. The war, ipso facto, may not have revoked the agency. If it did not so revoke it, it certainly did not enlarge the agency and confer upon the agent powers never delegated or even implied by any authority, powers directly contrary to the limitation of the authority of agent brought home to the insured by the policy itself.

Instructions 11, 12 are to the effect that your petitioner was excused from sending the renewal receipts to its agent, because it was both impossible and illegal, an impossibility and illegality of which the burden rested upon the assured. The court granted instruction 12.

Instructions 13, 14 refer to your petitioner as a mutual company and the dissolution thereof.

Instructions 15, 16, 18, 19, 20, 21 relate to the question of payment of the premiums, as to the receipt of the money by your petitioner, as to the transmission of the money to your petitioner during war, as to the authority of an agent to receive payment of premiums without renewal receipts signed by the president or actuary, as required by the limitation printed on the margin of the policy, and as to any payment being binding on your petitioner unless made in gold and silver, without the express authority or subsequent ratification of your petitioner.

15

Instructions 22 and 23 relate to the entry of Wm. T. Hendren into military service other than the militia not in actual service.

1 Phil. on Ins., 5th ed., sec. 68, p. 47; idem., sec. 67; Story on Agency, 7th ed., section 98, 181, 215, 413, 429, 430; Smith's Mercantile Law, 3d ed., Holcombe and Ghd., 190, 191; Story on Agency, 7th ed., 462–481; 1 Phil. on Ins., 5th ed., sec. 891, p. 491, sec. 897, p. 495; Chitty on Contr., ed. 1855, p. 745, (637,) 742, (634, 35,) 744, (636); Acey et al. vs. Fernie, 7 M. and W., 151; Want et als. vs. Blunt et als., 12 East, 183; Balt. and O. R. R. Co. v. Polley, Wood & Co., 14 Gratt., 447; Boulware v. Newton, 18 Gratt., 708; 2 Pars. Mar. L., 49; Piddell vs. Simms, 9, and Mar. 609; Hathaway vs. Trenton, Mu. L. and F. Ins. Co., 11 Cush., 448; Nightingale v. The State Mu. L. Ins. Co., 5 R. I., 42; Robinson vs. International Life Ass. Soc. of London, 52 Bar., 450, 1 Big. Life and Acc. Ins. Co. 601; The Julia, 8 Cranch, 155; Hanger vs. Abbott, 5 Wall., 236; the Wm. Bagalay, 5 Wall., 377; The Ouachita Cotton, 6 Wall., 521; Jecker vs. Montgomery, 18 How., 110; Dunlap's Paloy on Agency, 280, 281; Mutual Benefit Life Ins. Co. vs. Reese, 8 Geor., 534, 1 Big. Ca., 83; 3 Johns. Ca., 4; Higginson v. Dall., 14 Mass., 96; 3 Esp., 121; 1 T. R., 343; Malrey vs. Shaw, 4 Allen, 116; Storey on Agency, 7th ed., sec. 7, note 4, sec. 11; 1 Am. Le. Ca., 566; Carter v. Boekm, 1 Sm. Le. Ca., 6th Am. ed., 791.

6. The court erred in overruling your petitioner's motion for a new trial on the grounds stated in your petitioner's fourth bill of exceptions, pp. 64, 83, Record.

7. For other errors in the record apparent upon its face, your petitioner has made no reference to the case of the Manhattan Ins. Co. vs. Warwick, lately decided by this honorable court, because not yet fully advised of the extent and bearing of that decision in reference to this case, but your petitioner is advised that this case rests in many particulars on very different grounds from those which must have arisen on account of the facts in that case.

Wherefore, your petitioner prays a writ of error and supersedeas in order that the said judgment may be reviewed and reversed.

THE NEW YORK LIFE-INSURANCE COMPANY,
By TUCKER & OLD, *its Counsel.*

I, Tazewell Taylor, practicing in the supreme court of appeals of Virginia, do certify that, having examined the transcript of the record in the above suit, I am of opinion that the said judgment ought to be reviewed.

TAZEWELL TAYLOR.

NORFOLK, VA., *April* 28, 1871.

16 Writ of error and supersedeas awarded. Bond in the penalty of $7,000 to be given.

WALTER K. STAPLES.

To the clerk of the supreme court at Richmond.

HENRIETTA HENDREN, PLAINTIFF,
against
THE NEW YORK LIFE-INSURANCE COMPANY,
defendant.

Pleas at the court-house of the city of Norfolk, before the corporation court of the said city, on Tuesday, the 28th day of February, A. D. one thousand eight hundred and seventy-one.

Be it remembered that, heretofore, to wit, in the clerk's office of the corporation court of the city of Norfolk, on the 26th day of March, A. D. one thousand eight hundred and seventy, came Henrietta Hendren, by her attorneys, and sued out of the said clerk's office a summons against the New York Life-Insurance Company, to answer the plaintiff of a plea of trespass on the case in assumpsit; the return upon which said summons is in the following words and figures, to wit:

Executed by delivering copies of the within to J. C. Deming and R. C. M. Wingfield, on the 28th day of March, 1870, they being the agent of the New York Life-Insurance Company.

D. McLEOD, *Deputy*,
For J. H. CALRON, *Serg't.*

And afterwards, to wit, in the clerk's office of said court, on the 29th day of March, A. D. one thousand eight hundred and seventy, the plaintiff sued out an attachment against the defendant, which said attachment, and the return upon the same, is as follows, to wit:

The Commonwealth of Virginia to the sergeant of the city of Norfolk, greeting:

Whereas in an action of assumpsit, instituted in the court of the corporation of the city of Norfolk, in which Henrietta Hendren is plaintiff, and the New York Life-Insurance Company is defendant; T. R. Borland, agent and attorney for the plaintiff, this day made oath before Geo. E. Bowden, deputy clerk of said court, that plaintiff's claim amounts to $5,000, with interest thereon from the day of October, 1869; that the same is just; that there is present cause of action therefor;
17 that the said defendant is not a resident of this State, and that he, the affiant, believes that the said defendant has estate or debts due it within the corporation of the city of Norfolk. These are, therefore, in the name of the Commonwealth, to require you to attach the estate of the said, the New York Life-Insurance Company, for the amount above specified with interest and costs, and such estate so attached in your hands to secure or so provide that the same may be forthcoming and liable to further proceedings thereupon, to be had before the said court; and that you have this writ at the clerk's office of our said

court of the corporation of the city of Norfolk, at the rules to be holden for the said court on the first Monday in April next, and there make known how you have executed the same.

Given und'r my hand, as clerk of the said court, at the court-house, this 29th day of March, 1870, in the 94th year of the Commonwealth.

HENRY M. BOWDEN, *Clk.*

And the amounts upon the same are as follows, to wit:

The plaintiff designates the People's Bank of Norfolk as having effects, or of owing debts to the defendant.

Executed by delivering a copy of the within to J. C. Deming on the 29th day of March, 1870, he being the president of the People's Bank, of the city of Norfolk, said bank being designated as being in possession of effects, or of owing debts to the defendants, and I summoned him to appear on the first day of April term of the court of the corporation of the city of Norfolk, 1870.

JNO. L. DIGGS, *Deputy*,
For J. H. CALRON, *Serg't.*

And afterwards, to wit, at rules held at the clerk's office of said court, on the first Monday in April, A. D. 1870:

Came the plaintiff, by her attorneys, and filed her declaration against the defendant; which declaration is as follows, to wit:

COURT OF THE CORPORATION OF THE CITY OF NORFOLK, *to wit:*

Henrietta Hendren, plaintiff, complains of the New York Life-Insurance Company, an incorporated company, of a plea of trespass on the case in assumpsit, for this, to wit: that heretofore, to wit, on the 25th day of August, 1856, for and in consideration of the sum of thirty dollars, to them in hand paid by Henrietta Hendren, and of the further sums of thirty dollars, to be paid by her, successively on each of the 25th days November, February, and May, the next ensuing, and of the annual payment of one hundred and twenty dollars, to be by her paid quarterly, on the 25th days of August, November, February, and May, of every year during the continuance of the policy they, the 18 said defendants, insured the life of William T. Hendren, her husband, in the sum of $5,000, which they promise should be by them paid to her, the said plaintiff, or her legal representatives, within sixty days after the due notice and proof of the death of the said William T. Hendren, if she should survive him, and if not, that then they would pay the said sum of $5,000 to the children of the said Henrietta Hendren, or to their guardian if under age, within the sixty days after the due notic's and proof of death of the said William T. Hendren, provided that the said William T. Hendren should not, without the consent of the said company, previously obtained and endorsed upon the policy of insurance, pass beyond the settled limits of the United States that lie east of the Rocky Mountains, (excepting into the settled limits of the British Provinces of the two Canadas, Nova Scotia, and New Brunswick,) and should not, without such previous consent, so endorsed, visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Virginia and Kentucky, between the first of July and the 1st of November; and should not, without such previous consent, so endorsed, enter into any military or naval service whatever, (militia not in actual service excepted,) and that he

should not die in or in consequence of a duel, by the hands of justice, by the known violation of any law of the United States, of any State, or county, by intoxicating drink, or opium. And the said plaintiff avers that she paid the said several sum and sums, at the time and times specified, and that her said husband having kept and performed each and every of the conditions prescribed in the said policy of insurance, did, upon the 15th day of August, 1862, die; that due notice and proof of the death of her said husband, William T. Hendren, was given the said defendant; that sixty days have elapsed; that the said defendants, not regarding their said several promises and undertakings, have not, although often requested so to do, as yet paid the said plaintiff the said sum of five thousand dollars, or any part thereof, but the same to pay hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the plaintiff $15,000; and therefore she brings her suit.

BORLAND & G. C. THOMAS, *p. q.*

Whereupon the defendant being summoned and not appearing, on motion of the plaintiff, by her attorneys, it was ordered that judgment be entered for the plaintiff against the defendant, for what damages the plaintiff hath sustained by occasion of the non-performance of the promises and assumptions in the declaration mentioned, unless the said defendant should appear and plead to issue at the then next rules.

And afterwards, to wit, in the clerk's office of the said court, on the 6th day of April, 1870:

19 The plaintiff sued out an attachment against the defendant, which said attachment, and the return upon the same, is as follows, *to* wit:

The commonwealth of Virginia to the sergeant of the city of Richmond, greeting:

Whereas, in an action of assumpsit instituted in the court of the corporation of the city of Norfolk, in which Henrietta Hendren is plaintiff and the New York Life Insurance Company is defendant, T. R. Borland, agent and attorney for the plaintiff, on the 29th day of March, 1870, make' affidavit before Geo. E. Bowden, deputy clerk of said court, that plaintiff's claim amounts to $5,000, with interest thereon from the day of October, 1869; that the same is just; that there is present cause of action therefor; that the said defendant is not a resident of this State, and that he, the affiant, believes that the said defendant has estate or debts due it within the corporation of the city of Norfolk. These are therefore, in the name of the commonwealth, to require you to attach the estate of the said the New York Life Insurance Company for the amount above specified, with interest and costs, and such estate so attached in your hands to secure or so provide that the same may be forthcoming and liable to further proceedings thereupon to be had before the said court. And that you have this writ at the clerk's office of our said court of the corporation of the city of Norfolk, at the rules to be holden for the said court on the first Monday in May next, and then and there make known how you have executed the same.

Given under my hand as clerk of the said court, at the court-house, this sixth day of April, 1870, in the 94th year of the commonwealth.

HENRY M. BOWDEN, *Clk.*

The endorsements on the same are as follows, to wit:

The plaintiff designates the treasurer of the State of Virginia as having effects of, or owing debts to, the deft.

Executed April 8th, 1870, by delivering a true copy of the within attachment to Geo. Rye, treasurer of the State of Virginia, and summoning him to appear as a garnishee on the first day of the next term of the corporation court of the city of Norfolk.

BENJ. T. AUGUST, *D. S.*,
For C. S. MILLS, *Sgt.*

And afterwards, to wit, at rules in the clerk's office of the said corporation court of the city of Norfolk, on the first Monday in May, A. D. one thousand eight hundred and seventy:

The defendant still failing to appear, on the motion of the plaintiff, by her attorney, it was ordered, that the order made against the defendant in this cause be confirmed, and that the plaintiff's damages be ascertained by a jury at the then next term.

And on another day, to wit, at a corporation court held for the said city on Friday, the 12th day of August, A. D. 1870:

Came the parties, by their attorneys, and the defendant says that the declaration is not sufficient in law. And the plaintiff says that the declaration is sufficient in law. And the defendant saith that he did not assume upon himself in manner and form as the plaintiff against him hath complained, and of this he putteth himself upon the country, and the plaintiff likewise. Whereupon, it is ordered that the judgment obtained in the office against the said defendant be set aside, and leave is given him to file other pleas.

And afterwards, to wit, at a corporation court held for the said city on Thursday, the 13th day of October, A. D. 1870:

Came the parties, as well the plaintiff as the defendants, by their counsel, and for reasons appearing to the court, it is ordered that the attachment issued in this case, so far as it affects any funds or effects belonging to the defendants now in the hands of the Peoples' National Bank of the city of Norfolk, formerly the Peoples' Bank of Norfolk, be dissolved.

And afterwards, to wit, at a corporation court held for the said city on Thursday, the 16th day of February, A. D. 1871:

Came the parties, by their attorneys, and, the demurrer to the plaintiff's declaration being argued, was overruled. And thereupon the defendant filed eight pleas in writing; which said pleas are as follows, to wit:

In the court of the corporation of the city of Norfolk.

THE NEW YORK LIFE INSURANCE COMPANY, defendants, *ats.* HENRIETTA HENDREN, PLAINTIFF. } In assumpsit.

1. And the said defendants, by their attorneys, Tucker & Old, come and say: That they did not undertake or promise in manner and form

as the said plaintiff hath above thereof complained against them; and of this they put themselves upon the country.

2. And for a further plea in this behalf, the said defendants, by their said attorneys, say: That the said plaintiff hath not, as she, the said
21 plaintiff, hath thereof above alleged, given the said defendants due proof and notice of the death of the said Wm. T. Hendren; and of this the said defendants put themselves upon the country.

3. And for a further plea in this behalf, the said defendants, by their said attorneys, say: That the said plaintiff did not, as she, the said plaintiff, hath thereof above alleged, pay the said sum or sums of money at the time and times specified, to wit: the said sum of $30 on the 25th day of August, A. D. 1857, and the further sum of $30 successively on each of the 25th days of November, February, and May then next ensuing, and the annual sum of $120 quarterly on the 25th days of August, November, Feb'y, and May of every year during the continuance of the said policy. But the said defendants, not admitting any of the said payments to have been made at the time and times specified, say, that the said plaintiff, after the making of the said promise by the said defendants by the said plaintiff thereof above alleged in her declaration, and before the death of said Wm. T. Hendren, wholly failed, neglected, and refused to pay the quarterly instalments of the said annual sum of $120, which became and were due on each of the 25th days of May, August, and November, A. D. 1861, and on each of the 25th days of February and May, A. D. 1862, to wit, the sum of $30 on each of said days; and of this the said defendants put themselves upon the country.

4. And for a further plea in this behalf, the said defendant', by their said attorneys, say: That after the making of the said promise by the said defendant' as the said plaintiff hath thereof above alleged in her said declaration, and before the death of the said Wm. T. Hendren, the said plaintiff wholly failed, neglected, and refused to pay the quarterly instalment of the said annual sum of $120, to wit, the sum of $30, when the same became due and payable, on the 25th day of May, A. D. 1861; and of this the said defendants put themselves upon the country.

5. And for a further plea in this behalf, the said defendants, by their said attorneys, say: That after the making of the said promise by the said defendants as the said plaintiff hath thereof above alleged in her said declaration, and before the death of the said Wm. T. Hendren, the said plaintiff wholly failed, neglected, and refused to pay the quarterly installments of the said annual sum of $120, to wit, the sum of $30 on the 25th day of May, A. D. 1862, when the same became due and payable; and of this the said defendants put themselv's upon the country.

6. And for a further plea in this behalf, the said defendants, by their said attorneys, say: That at the time of the making of the said promise by the said defendants by the said plaintiff thereof above alleged in her said declaration, the said defendants were, and have continued since to be, a corporation duly incorporated under the laws of the State of New York; and that the said Wm. T. Hendren did, after the making of the said promise by the said defendants by the said plaintiff, so alleged, connect himself with the government of the
22 so-called Confederate States of America, and voluntarily reside within its military lines, and continue to reside within and be connected with the said government to the time of his death; which said government and States were, and continued after his said death, in open hostility to, and engaged in war with, the Government of the United States; and this the said defendants are ready to verify.

TUCKER & OLD, *P. D.*

In the court of the corporation of the city of Norfolk.

THE NEW YORK LIFE-INSURANCE COMPANY, defendants, *ats.* HENRIETTA HENDREN, PLAINTIFF.

7. And for a further plea in this behalf, the said defendants, by their said attorneys, say: That at the time of making of the said promise by the said defendants, by the said plaintiff thereof above alleged in her said declaration, the said defendants were, and have continued since to be, a corporation duly incorporated under the laws of the State of New York, and as such was, and continued to be, a citizen of and at peace with the Government of the United States. And that the said Wm. T. Hendren and Henrietta, his wife, the plaintiff in this action, after the making of the said promise by the said defendants by the said plaintiff so alleged, were, to wit, from the 16th day of August, A. D. 1861, to the time of the death of the said Wm. T. Hendren, and continued to be residents of the State of Virginia, and did connect themselves with the government of the so-called Confederate States of America, and voluntarily reside within its military lines, and did continue to reside within, and be connected with the said government during the said time; which said government and States were and continued to be in open hostility to, and engaged in war with, the Government of the United States, from the 16th day of August, A. D. 1861, to the time of and after the death of the said Wm. T. Hendren; and this the defendants are ready to verify.

TUCKER & OLD, *P. D.*

In the court of the corporation of the city of Norfolk.

THE NEW YORK LIFE-INSURANCE COMPANY, defendants, *ats.* HENRIETTA HENDREN, PLAINTIFF.

8. And for a further plea in this behalf, the said defendants, by their said attorney, say: That the said Wm. T. Hendren did, after the making of the said promise by the said defendants by the said plaintiff hereof above alleged in her said declaration, enter into military
23 service, other than the militia, not in actual service; and of this the said defendants put themselves upon the country.

TUCKER & OLD, *P. D.*

Upon the first, second, third, fourth, fifth, and eighth of which the plaintiff joined issue; but the plaintiff saith that the said sixth plea is not sufficient in law, and the defendant saith that the sixth plea is sufficient in law; and the plaintiff saith that the seventh plea is not sufficient in law, and the defendant saith that the said seventh plea is sufficient in law. Whereupon the said demurrers to the said sixth and seventh pleas being argued, the court takes time to consider of its opinion.

And afterwards, to wit, at a corporation court held for the said city, on Friday, the 17th day of February, A. D. 1871:

Came again the parties by their attorneys, and the court having maturely considered the matters arising under the plaintiff's several demurrers to the 6th and 7th pleas of the defendant, is of opinion that the

said pleas are insufficient in law, and that the said demurrers to the said pleas should be sustained. Therefore it is considered by the court that the defendant pay to the plaintiff his costs occasioned him by the said defendants filing said insufficient pleas. And thereupon came a jury, to wit, W. A. James, G. W. Dey, Harvey Jones, K. B. Elliott, William Erxleben, J. H. Dawson, W. N. Miller, Christopher Hall, J. H. King, T. B. Anderson, A. W. Grandy, and C. R. Lipscomb, who being duly selected by lot according to law, were empannelled and sworn the truth to speak upon the issues joined on the said 1st, 2nd, 3rd, 4th, 5th, and 8th pleas of the defendant. And having partly heard the evidence, were adjourned till to-morrow morning, 10 o'clock.

And afterwards, to wit, at a corporation court held for the said city, on Saturday the 18th day of February, A. D. 1871:

Came again the parties by their attorneys, and the jury sworn yesterday, to try the issue in this cause appeared in court according to their adjournment, and having further heard the evidence, by consent of the parties, and with the assent of the court, were adjourned till Monday morning, 10 o'clock.

And afterwards, to wit, at a corporation court held for the said city, on Monday, the 20th day of February, A. D. 1871:

Came again the parties by their attorneys, and the jury sworn to try the issue in this cause appeared in court according to their adjournment, and having further heard the evidence, by consent of parties, and with the assent of the court, were adjourned till to-morrow morning, 10½ o'clock.

24 And afterwards, to wit, at a corporation court held for the said city on Tuesday the 21st day of February, A. D. 1871:

Came again the parties by their attorneys, and the jury sworn to try the issue in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, by consent of the parties, and with the assent of the court, were adjourned till to-morrow morning, 10 o'clock.

And afterwards, to wit, at a coporation court held for the said city, on Wednesday, the 22nd day of February, A. D. 1871:

Came again the parties by their attorneys, and the jury sworn to try the issue in this cause appeared in court according to their adjournment on yesterday, and having further heard the evidence, by consent of parties and with the assent of the court, were adjourned till to-morrow morning, 10 o'clock.

And afterwards, to wit, at a corporation court held for the said city, on Thursday, the 23rd day of February, A. D 1871:

Came again the parties by their attorneys, and the jury sworn to try the issue in this cause appeared in court according to their adjournment on yesterday, and having fully heard the evidence, upon their oath do say, "We, the jury, find for the plaintiff, and assess her damages at five thousand (5,000) dollars, with interest from the 2nd day of February, 1870." Whereupon, the defendant, by its attorney, moved the court to set aside the verdict rendered in this cause, and grant him a new trial therein upon the ground that the said verdict is contrary to the law and the evidence; which motion being argued, was overruled, to which opinion and ruling of the court, the defendant excepted, and leave is hereby given him to tender his bill of exceptions on any day before the adjournment of this term. Therefore, it is considered by the court, that the plaintiff recover against the defendant, five thousand dollars ($5,000,) her damages assessed as aforesaid, with interest thereon from the 2nd

day of February, A. D. 1870, and her costs by her about her suit in this behalf expended; and the said defendant in mercy, &c.

Memorandum.—On the trial of the last cause, the defendant, by his attorney, excepted to the opinions and rulings of the court upon sundry matters arising in said trial, and tendered his three several bills of exceptions; which were received, signed, and sealed by the court, and ordered to be made a part of the record in this cause, as follows, to wit:

First bill of exceptions.

Be it remembered, that after the jury were sworn to try the issue joined in this suit, the plaintiff offered in evidence the policy of insurance, as follows:

25 THE NEW YORK LIFE-INSURANCE COMPANY.

No. 11273.

Annual premium, $120.
Age, 29.
Payable quarterly.
Aug. 25th..... $30
Nov. 25th..... 30
Feb'y 25th..... 30
May 25th..... 30
Sum insured, $5,000.

This policy of insurance witnesseth, that the New York Life-Insurance Company, in consideration of the sum of thirty dollars and cents, to them in hand paid by Mrs. Henrietta Hendren, wife of William T. Hendren, and the three further sums of thirty dollars each to be paid successively on the twenty-fifth days of November, February, and May next, and of the annual premium of one hundred and twenty dollars and cents, to be paid quarterly on the twenty-fifth days of Aug., Nov., Feb., and May, in every year during the continuance of this policy, do assure the life of William T. Hendren, lawyer, of Norfolk, in the county of Norfolk, State of Virginia, for the sole use of the said Mrs. Henrietta Hendren, in the amount of five thousand dollars for the term of his natural life, commencing the twenty-fifth day of August, 1856, at noon. And the said company do hereby promise and agree to, and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said Mrs. Henrietta Hendren or her legal representatives, within sixty days after due notice, and proof of the death of the said William T. Hendren. And in case of the death of the said Mrs. Henrietta Hendren, before the decease of the said William T. Hendren, the amount of the said insurance shall be payable after her death to her children for their use or to their guardian, if under age, within sixty days after due notice and proof of the death of the aforesaid William T. Hendren.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said William T. Hendren shall, without the consent of this company previously obtained, and endorsed upon this policy, pass beyond the settled limits of the United States that lie east of the Rocky Mountains, (excepting into the settled limits of the British provinces of the two Canadas, Nova Scotia, or New Brunswick,) or shall, without such previous consent thus endorsed, visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Virginia and Kentucky, between the first of July and the first of November, or shall, without such previous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted,) or in case he shall die in, or in consequence of, a duel, or by the hands of justice, or in the known violation

of any law of the United States, or of any State or country, or in case his death shall be caused by intoxicating drink or opium, this
26 policy shall be null and void. And it is also understood and agreed to be the true intent and meaning hereof, that if the declaration made by the said Mrs. Henrietta Hendren and bearing date the twentieth day of August, 1856, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void; or in case the said Mrs. Henrietta Hendren shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof; and this policy shall cease and determine.

All receipts for premiums paid at agencies, are to be signed by the president or actuary.

N. B. If assigned, notice to be given the company.

In witness whereof, the said New York Life-Insurance Company have, by their president and actuary, signed and delivered this contract, this twenty-fifth day of August, one thousand eight hundred and fifty-six.

MORRIS FRANKLIN, *President.*

PLINY FREEMAN, *Actuary.*

To the admissibility of which in evidence under the declaration, the defendant excepted on the ground of variance in this, that it omits the proviso, that if the declaration of August 20th, 1856, be in any respect untrue, the policy should be void, and any allegation that said allegation was true, and on other grounds apparent on the record. The plaintiff then asked leave to amend his declaration by inserting the following words, to wit: All receipts for premiums paid at agencies are to be signed by the president or actuary. Between the words "die" and "that" of the 2nd line, 3rd page, (see mark of star in declaration,) the following words: "And that the declaration made by the said plaintiff on the 20th August, 1856, on the faith of which the said policy recites that it is made, is not in any respect untrue, but is in every particular true, and that all things on her part to be done and performed, and all conditions by her to be complied with, have been done and performed, and complied with." The court allowed said amendment, to which allowance and ruling of the court the defendant excepted, and prayed that this their first bill of exception may be signed, sealed, and enrolled; which is done accordingly, on this seventeenth day of February, 1871.

W. H. BURROUGHS. [SEAL.]

Second bill of exceptions.

Be it remembered that, after the signing, sealing, and enrolling the first bill of exception, made a part hereof and prayed to be incorporated herewith, the plaintiff, to sustain the issue on her part, offered in evidence the policy of insurance following, (see page 15,) and offered evi-
27 dence by F. F. Ferguson, a competent witness, tending to prove the due execution of said policy and the genuineness of the signatures thereto, he being familiar with the signatures and knowing them to be the president and actuary, and that the signatures were theirs, and offered in evidence a receipt dated 25th Feb., 1858, signed by the president and countersigned by the witness Ferguson, he being then the agent of the defendant, as follows, to wit:

NEW YORK LIFE-INSURANCE CO.,
Feb'y 25th, 1858.

Policy No. 11273, $30. Cash 60 p. c. Note 40 p. c. Int. on notes.
Received the sum of thirty dollars, in full for quarter premium on policy numbered as above, on life of Wm. T. Hendren for $5,000, to May 25th, 1858.

MORRIS FRANKLIN,
President.

F. F. FERGUSON.

Not valid unless countersigned by F. F. Ferguson.

Witness added that the money for said receipt had never been paid by Mr. Hendren, but nevertheless the witness had delivered said receipt to Mr. Hendren, and he, the witness, had paid the defendant, and Hendren gave witness his check, and when he took Hendren's check he had already accounted for the Feb. premium. And offered in evidence another receipt dated 25th August, 1858, signed by the president of the defendant and countersigned by R. H. Vaughan, then agent of the defendant, as follows, to wit:

NEW YORK LIFE-INSURANCE COMPANY,
Aug. 25th, 1858.

Policy No. 11273, $30. Cash 60 p. c. Note 40 p. c. Int. on notes.
Received the sum of thirty dollars, in full for quarterly premium on policy numbered as above, on life of William T. Hendren for $5,000, to November 25th, 1858.

MORRIS FRANKLIN,
President.

R. H. VAUGHAN.

Not valid unless countersigned by R. H. Vaughan.

And offered in evidence a printed notice to Mr. Hendren that his premium was due, the notice being dated July, 1860, said notice being in the usual form of those sent by defendant to him, as follows, to wit:

28 OFFICE OF THE NEW YORK LIFE-INSURANCE COMPANY,
112 *and* 114 *Broadway, New York, July*, 1860.

Mr. WM. T. HENDREN, *Hampton, Va.:*

SIR: The qur. premium on your policy, No. 11273, amounting to $30, for insurance in the sum of $5,000, on the life of yourself, will be due on the 25th day of Aug., 1860.

Respectfully yours,

PLINY FREEMAN,
Actuary.

Payable at the agency of R. H. Vaughan.
☞ Please hand in this notice when you pay this premium.

And that R. H. Vaughan was agent of defendant in Hampton, but witness did not know when Vaughan became agent; that witness made monthly settlements with the company; that he deposited the money received in payment for premiums in a separate account in bank; that

he paid the company by drafts on New York, after deducting his commissions, and did not transmit the same money that he received; that the company sent receipts for the premiums, signed by the president of the company, and then the witness countersigned them and delivered them; some paid in cash and some in notes, viz: 40 per cent. notes and 60 per cent. cash; that it was usual to send out notices, but not a universal rule; that the company usually sent the notices and the receipts together; and upon cross-examination, Ferguson testified that witness was local agent for Norfolk City and the adjoining counties; that he took a good many risks in Elizabeth City, but witness transferred them to R. H. Vaughan when he became agent; that witness had no right to receive money from any party unless he had receipts; that such receipts were not valid unless so signed by the president or actuary of the company; and the company did not hold themselves bound by anything else; that the witness had no authority to alter contracts; that witness would, in many instances, pay the company before parties owning premiums had paid him; but then he always gave the parties their receipts; that the company requires the returns of the receipts or the money for them; that if witness parts with the receipt the company holds him liable; and on being re-examined, this witness testified that he had as many as one thousand dollars more or less of due-bills given to him by parties insured for premiums, which due-bills had never been paid, but he always gave the company's receipts when parties gave their due-bills to him individually, and these were private debts, and as soon as the company's receipt went out of witness' hand, he charged himself in account with the com-
29 pany. And plaintiff further offered evidence by Rev. George F. Adams, a competent witness, that he went to the office of the defendant in New York, in the fall of 1868, as he had been requested to do by Mrs. Hendren; that he had got the dates and No. of the policy from Mrs. Hendren; that he saw the president of the company and told his errand; that the president called a clerk, and the clerk brought a book, and the president, after examing the book, said that the policy had lapsed some two or three months before Hendren died. This was in Oct'r or Nov'r, 1868. The president said nothing could be done; he denied all liability; witness had no authority to receive the money; that the president seemed to know that Mr. Hendren was dead; he said nothing about notice. He said no compromise could be made, and the company could not pay any part of it. Upon cross-examination, he said it might be some months, but it was in the spring. And plaintiff further offered evidence by Dr. Wm. R. Vaughan, physician in Hampton; that Mr. Hendren married the sister of witness; that Hendren's age was about the same as witness; that he, witness, is now 43 years of age; that R. H. Vaughan, brother of witness, was agent of the Norfolk Life-Insurance Company; that Mr. Hendren died in August, 1862; that Hendren resided in Norfolk in 1856; that Mr. Hendren left Norfolk in spring of 1862; that he never saw Mr. Hendren pay Mr. Vaughan any premiums; that witness' sister, who died during the war, did loan Mr. Hendren money to meet a premium which became due prior to the war. On one occasion Mr. Vaughan gave me a receipt without my paying the premium, he paying the company and I afterwards repaying him, witness being insured in the same company. Mr. Hendren's health was bad in 1859. He had consumption in Ap'l, 1862, and, until his death, witness was attending physician, and Drs. Crenshaw, Cabell, and Moore also attended. And on cross-examination, this witness said that Mr. Hendren was in the office of Mr. Groner, who

was in the adjutant-general's office. He was a clerk of Mr. Groner in that office. Mr. Hendren went to Richmond in Jan. or Feb., 1862, and then went into that employment; after that, never went into any other employment before his death. He knew that R. H. Vaughan's agency embraced the counties of York, Warwick, and Elizabeth City; and witness did not know of any other county, or whether there were any other or not, and did not know what extent of country he was agent for. Witness was examining physician for defendant, and knew the insurance made and the residence of parties; don't recollect any from any other than the counties named. R. H. Vaughan died in Feb., 1864. He was then in the service of the confederate army. He volunteered as a private in a cavalry command at the commencement of hostilities; that he was made a captain in 1861, served on Gen'l Magruder's staff, left Yorktown about 3rd May, 1862, and went to Richmond. He was an officer in the confederate army from the commencement of hostilities until his death; that R. H. Vaughan was frequently at his home; that witness remembers the recovery of a chest of papers of R. H.
30 Vaughan's which had been lost during the war. The plaintiff further offered evidence, she herself being witness, and here it is admitted by defendant that the plaintiff did, on 2d Dec., 1869, give notice and due proof of the death of Mr. Hendren, as required by the policy. This witness offered evidence tending to prove that her husband, Mr. Hendren, was a practicing lawyer, and was 33 or 34 years old when he died, which was 18 Aug., 1862, in Richmond; that he had removed from Norfolk to Richmond in the beginning of the year 1862, and witness had gone to Richmond about last of April or 1st May, the city of Norfolk and Hampton having fallen within the United States Army lines on 10th May, 1862. R. H. Vaughan, the agent of the company, was brother of this witness. Mr. Hendren's health began to fail in 1861; that Mr. Vaughan had been in the habit of receiving the premiums and receipting for them; that Mr. Hendren gave a good many of his papers to Mr. Vaughan before May, 1861, for safe custody; that Mr. Vaughan was in the habit of attending to business matters for Mr. Hendren; that the policy of insurance and receipts and notices given in evidence were among the papers placed in possession of Mr. Vaughan, and were only recently recovered. Mr. Vaughan's papers having been for some time lost, the following evidence of Mrs. Hendren was then offered and taken, subject to exception and the ruling of the court thereon, viz:

That there was an agreement between Mr. Vaughan and Mr. Hendren about the payment of premiums made in Hampton. They afterwards spoke of it in presence of witness. Mr. Hendren's health at this time was very feeble, and that he was anxious about the payment of these premiums, and that witness' brother, R. H. Vaughan, told my husband not to make himself uneasy about these payments, that he would attend to them himself and see them properly paid up; the payments he was speaking of were the premiums on the policy.

Witness then said: I don't think there was anything else said. It was afterwards to be settled between them privately.

This was before 1st May, 1861, at least before 25th May. The same thing was afterwards repeated to my husband and to me several times. I felt uneasy about them. My brother told me afterwards he had paid them. Mr. Hendren was anxious and uneasy because of his circumstances of pecuniary embarrassment; and this is the reason that led to the agreement.

And this witness, being further interrogated by her counsel whether

her brother had not always referred to it as an agreement that he would himself become responsible to the company for the premiums as they fell due, and settle the matter as an individually debt, said yes. I was anxious about the payments of these premiums, and frequently asked my brother if they were paid, and he always told me that they were. Whenever I asked him, he always assured me that the premiums were paid up and the policy all right; and this I did at intervals up to the time of Mr. Hendren's death. And my brother
31 told me three days before Mr. Hendren's death that the premiums were paid; that he had attended to it, and the policy was all right. And after Mr. Hendren's death, the day after the funeral, I asked him if I would get this insurance money, and he said yes. He said there would be no difficulty about it after the war was over; that he would attend to it himself as soon as communication was opened.

The two receipts and four notices, as follows, to wit,
[For two receipts see pages 18 and 19, and for one notice see p. 19.]

OFFICE OF THE NEW YORK LIFE-INSURANCE COMPANY,
112 *and* 114 *Broadway, New York, Jan.* —, 1860.

Mr. WM. T. HENDREN, *Hampton, Va.:*

SIR: The qur. premium on your policy No. 11273, amounting to $30, for insurance in the sum of $5,000 on the life of yourself, will be due on the 25 day of February, 1860.

Respectfully, yours,

PLINY FREEMAN, *Actuary.*

R. H. VAUGHAN, *Agent.*

☞ Please hand in this notice when you pay this premium.

OFFICE OF THE NEW YORK LIFE-INSURANCE COMPANY,
Nos. 112 *and* 114 *Broadway, New York, Oct.* —, 1859.

Mr. WM. T. HENDREN, *Hampton:*

Sir: The qur. premium on your policy, No. 11273, amounting to $30, for insurance in the sum of $5,000 on life of yourself, will be due on the 25 day of Nov., 1859.

Respectfully, yours,

PLINY FREEMAN, *Actuary.*

R. H. VAUGHN, *Agent.*

☞ Please hand in this notice when you pay this premium.

OFFICE OF THE NEW YORK LIFE-INSURANCE COMPANY,
Nos. 112 *and* 114 *Broadway, New York, Oct.* —, 1858.

Mr. WM. T. HENDREN, *Hampton:*

SIR: The qur. premium on your policy, No. 11273, amounting to $30, for insurance in the sum of $5,000 on the life of yourself, will be due on the 25th day of Nov., 1858.

Respectfully, yours,

PLINY FREEMAN, *Actuary.*

R. H. VAUGHN, *Agent.*

☞ Please hand in this notice when you pay this premium.

32 were shown to witness, and identified by her as having been among the papers given by Mr. Hendren to her brother for safe custody, which were recovered by witness several years after the war,

when Mr. Vaughan's papers were found. I never had more than one policy on my husband's life.

I gave my gold watch and chain to Mr. Hendren, and he gave them to Mr. Vaughan as security to Mr. Vaughan for the personal responsibility he was assuming for Mr. Hendren. This was about the last of April or 1st May, 1861. Mr. Vaughan gave back the chain to me, saying he could fix it without the chain. The watch was never returned to me or to Mr. Hendren.

The defendant then excepted to so much of the testimony of Mrs. Hendren so taken subject to exception, as any evidence of payment to the defendant, without some evidence of receipts signed by the president or actuary as mentioned in memorandum on margin of policy, being given for such payments.

The court being of opinion that this testimony was admissible to show payment, allowed it to go to the jury; to which ruling of the court the defendant excepted, and prayed the court to sign, seal, and enroll this, its third bill of exceptions, which is accordingly done on this twentieth day of February, 1871.

[SEAL.] W. H. BURROUGHS.

Third bill of exceptions.

Be it remembered that at the trial of this cause, and after the signing sealing, and enrolling of the second bill of exceptions in the same, which is made part hereof, and prayed to be incorporated herewith, the plaintiff introduced other witnesses and other testimony in addition to that set forth in the said last-mentioned bill of exceptions, as follows: By F. F. Ferguson, who was recalled, evidence tending to prove, testified as follows:

To the question, "When did you cease to be agent?" he replied:

When the war broke out the company ceased sending me receipts; after that they sent me no receipts. I continued to act and to attend, &c., to some little business for the company; that the company then stopped sending renewal receipts on policies of insurance because communication was stopped on account of war. I continued to act after the war commenced, and delivered all receipts for premiums which had been sent me prior to the war, and received money for same, except such as were returned after the war. The company had but little business during the war here, and such as they had I attended to it for them. They continued to correspond with me after the war. All their correspondence related to the business of the company. Communication was opened in May, 1862. I did not renew any policies during the war, after I had delivered the receipts sent me in April, because I had no right to do so. Several persons during
33 the war claimed the right to pay their premiums, and some did so, in confederate and Virginia bank money; and I received the money in each case, and gave them receipts for it, conditioned upon the ratification of the company. I made special deposits of each sum so paid me, and have paid it all back to the parties. The communication I had with the company after the evacuation was in reference to some policies which had been paid up and the parties had died, in relation to some scrip, and in relation to my April, and perhaps May, 1861, accounts. I had not accounted to the company for the April and May receipts sent me before communication was closed, because communication was closed before I was ready; these receipts had been charged to me by the company, and I had collected the money on many of them.

The first communication was from the company to me; there were several letters passed between us. I was taken up before General Viele, the general then commanding in Norfolk, about one of these policies, that of Mr. Griffith, referred to in one of these letters. When communication was opened the company did not discontinue my agency. I received a letter in reference to the receipts they had sent me, and thanking me for my promptness, they did not send me any specific revocation of my authority. These letters were received by me from the company; they were directed to me individually; they are agency-letters. The said letters are as follows, to wit:

"A."

OFFICE OF THE NEW YORK LIFE-INSURANCE CO.,
112 *and* 114 *Broadway, New York, July* 10, 1862.

F. F. FERGUSON, Esq., *Norfolk:*

DEAR SIR: Will you be kind enough to inform us if any money, and, if so, how much, has been paid upon the policy on the life of Richard A. Warrell; as, if our recollection is correct, we instructed you to appropriate all funds in your hands to that purpose. As postal communication between the two cities is now open, we hope to hear from you at an early day.

With due respect, I remain your obt. servt.,

MORRIS FRANKLIN, *Pres.*

P. S.—We settled with Mrs. Grifith yesterday, and she has probably left for her home.

"B."

OFFICE OF THE NEW YORK LIFE-INSURANCE CO.,
112 *and* 114 *Broadway, New York, October* 16*th*, 1862.

F. F. FERGUSON, Esq., *Norfolk:*

DEAR SIR: We are very much embarrassed in reference to our
34 Norfolk business, owing to the fact that we are entirely ignorant as to the accounts with our agent. Every few days applications are made as to the effect of their payments made at your agency, and we are under the necessity of saying that we are unadvised, and must await information from that point before giving an answer. You are aware that policies cannot be legally renewed, except by receipts signed by one of the officers and countersigned by the agent. Will you, without any further delay, give us the necessary information, to enable us understand'ly to answer our policy-holders, and oblige,

Very resp'y, your obed't serv't,

MORRIS FRANKLIN, *Pres.*

"C."

OFFICE OF THE NEW YORK LIFE-INSURANCE CO.,
112 *and* 114 *Broadway, New York, Dec.* 12, 1862.

F. F. FERGUSON, Esq., *Norfolk:*

DEAR SIR: We enclose herewith cert's Nos. 13,252, 13,251, 13,250, also checks Nos. 6,630, 6,631, 6,632. A copy of ac't as settled by Mr. Bloss has been forwarded, and that will enable you to make out the commission ac't referred to in yours 2nd inst.

I am, very respectfully, yours, etc.,

MORRIS FRANKLIN, *Pres.*

"D."

NEW YORK, *January 27th*, 1863.

F. F. FERGUSON, Esq., *Norfolk:*

DEAR SIR: Your favor of 7th inst. was received, and would have been more promptly replied to but for the pressure attending the making up of our annual statements. Enclosed are the certificates for the dividends of 1861, for Mr. Deming and Mr. Taylor. The next payment on the scrip you make enquiry about will be in March, when the 3rd instalment of 20 per cent. on dividends between 1850 and '60 becomes due. We also enclose you a statement of comm'ns to your credit, am't'g to $77.21, and note your wish that we should deduct from the same the premium due on your policy. We shall be pleased to receive from you some settlement by which we can check off the 14 renewal receipts still outstanding in your acc't.

Very respectfully, yours, &c.,

PLINY FREEMAN, *Actuary.*

35 Agent in second letter refers to witness:

This is the account for receipts. It is an account with me for renewal receipts made out by the company. It was received by me by mail from New York after the evacuation of Norfolk. It is the statement referred to in the letter of October 16, 1862. I had not made my return last due before communication was stopped. I could not make it on that account.

(For the said account above referred to see page 84 at the end of this record.)

The entries on margin, on right-hand of account, under charges, &c., represents settlements made when Mr. Bloss, the agent of company, who was sent on by the company after the evacuation of Norfolk, settled the same with me, I suppose. I do not remember what the date, Aug. 28, '62, refers to; suppose it refers to the time I settled Mr. Bloss, but do not know. The receipts marked "returned" were not delived to the parties entitled to them because not called for. They were charged to me in my April (1861) account, and I returned the receipts as a credit on my account. Some of these receipts, though not delivered to parties insured, were not returned, because mislaid, as marked. They were in my desk, and some soldiers, members of an Illinois regt., broke it open, and those receipts were lost. Mr. R. A. Worrell died in April or May, 1861. The entry of May 26, opposite Griffith's name, represents his premium became due at that date, when it was paid, and carried his policy for the ensuing year, his being an annual premium. He died during that year, and his policy was paid. The meaning of "paid by scrip deposited" is, for several years scrip was payable in cash, the dividends of the company were declared annually, and scrip was issued for these dividends to the policy-holders, with interest thereon payable annually; and after this scrip had been issued five years the company then took in the scrip for the first of the preceding five years in part-payment of the year's premium then due, or paid it in cash. Mr. Bloss made the entries on the account, I think. The notes there referred to were received by me in May, 1861, from the parties. Mr. Barry I could not find. I used to return $20,000 or $30,000 a year to the company. These are the instructions to agents. The instruction referred to is on the back of account at end of this record, and is as follows, to wit:

Memorandum.

The agent, by reference to his appointment, will find in the instructions thereto attached the following points to be observed in rendering this account:

36 1. Returns are to be forwarded on or before the last week-day of each month.

2. Vouchers for all expenditures to accompany the account in which the charge is made.

3. Remittances to be made by a sight-draft on bank certificate of deposit, payable to the order of the company.

4. Policy-fee to be credited to the company.

5. For the collection of premiums upon risks originally obtained by other parties the commission allowed is 2½ per cent.

6. The premium cannot be received after it becomes due unless the party is in good health.

7. Policies or renewal receipts remaining unpaid to be returned with the monthly account, unless there are special reasons for the detention, which reasons are to be noted on the return.

8. Agents crediting premiums actually received by them do so at their own personal risk, and for which the company will not, under any circumstances, be responsible to remit the same upon their non-receipt by the agent.

The agents receiving the receipts were responsible for them unless returned by the agent to be cancelled. Mr. Vaughan was the same kind of agent as myself at Hampton. All the receipts I had when the war broke out I received some time before. In every case in which I did not have a receipt signed by the president or actuary I gave my individual receipt to parties and made a special deposit as before stated. One of the parties on my list rode down to Boushes' Bluff, where I was stationed, to pay me his premium, 3½ miles from Norfolk. I was captain of Norfolk Juniors in January, 1861, went into confederate service with my company April 19th, 1861, and served partly independ-
37 ently and part of time in Co. K, 12th Va. Regt., until May, 1862, at which latter date, upon the re-organization of the army, I was turned out of office by my company. The account here is statement from the company of dividends for that year with Vaughan. The said account is as follows, to wit:

Statement of dividends and interest.

Agency of the New York Life Insurance Company at Hampton, Virginia. R. H. Vaughan, agent.

Observe 1st. The interest items on this sheet are the gross sums due on dividends to March, 1860, and include any and all balances rendered in former statements remaining unpaid.

2d. Scrip certificates are not issued where any premium notes stand against the policy.

3d. Where premium notes have been given interest on dividends is allowed in settlement of the next payment of premium, but is not to be paid should the policy be discontinued, it being credited against interest due on notes.

4th. All payments of interest upon certificates should be endorsed on the back thereof thus: Interest paid to March, 1860.

5th. All dividend and interest receipts are to be sent to the home office with the monthly returns.

6th. No certificates are issued for a less amount than ten dollars.

No. of Ledger.	Folio.	No. of Policy.		Total dividends previous to 1860.	Dividend of 1860.	No. of certificate herewith.	Total int. to March, 1860.
3	337		J. H. Hendren	72		Iss'd	4 32
2	326	11,273	Henrietta Hendren		36	9725	
	388	11,337	C. C. Jett	68	34	N.	4 08
	396	11,348	Fran. A. Schmeltz	110	55	9726	6 60
	402	11,353	G. T. Massenberg	180	90	N.	10 80
	549	11,516	G. A. Cary	25	25	N.	1 50
5	3	12,186	Richard M. Cary		38	N.	
	79	12,562	John B. Cary		28	9727	

MAY 14, 1860.

The dividend due Mrs. H. Hendren for that year, up to March, 1860, by this account, is $36. The dividend having been declared it was Mrs. Hendren's. Whatever the policy-holder was entitled to on account of dividends declared, the party is entitled to, over and above the amount of the policy.

From the first of the following year after insuring, the insured became entitled to a dividend. The company some years ago declared 50
38 per cent. dividend, afterwards 40, then 30 per cent., but never less than 30 per cent. after 1856; one year did not declare any dividend; it was before 1856. A dividend was declared from 1856 to 1861, never less than 30 p. c. Mrs. H. was entitled to dividend from 1st of 1857 for each year thereafter. I did not receive any communication from the North until after the evacuation of Norfolk, May 10, 1862; it was some time after that before letters passed. My agency ceased after the war broke out, because the company could not send me the renewal receipts for premiums due on policies. As agent during the war I made only private arrangements with parties who claimed the right to pay the premiums. I returned the money in every case to the parties who so paid me. One of the rules of the company was that I should not receive any money, except upon printed receipts signed by the president or actuary. That was one of the rules of the company sent to the agents. There was a general agent, Mr. Charles E. Wortham, at Richmond, and the other agents in the State were all local agents. Mr. Vaughan was local agent for Elizabeth City County and vicinity.

Mr. Hendren was living in Norfolk when he was insured. I took his insurance. I collected the premiums up to 1858; the last premium due, which I collected, was that of February 25th, 1858. This was paid by me. I delivered the receipt and paid company. When Mr. Hendren moved from Norfolk to Hampton I no longer collected the premiums on his policy, but transferred him to Vaughan's list, as he had removed to his locality. When Mr. Hendren moved back to Norfolk he was not put back on my list. I was not advised of his coming to Norfolk. Mr. Hendren did not, nor did any one for him, pay me any premiums in 1861. If he was in Norfolk in 1861 he was in my locality. He was not here to my knowledge. It would depend upon whether I had the receipt for premium, whether I would have gone to Richmond to collect premiums. If the company had sent me a receipt to collect a premium on policy of person living in Richmond I should have collected it, if possible. The company is, so far as I know, a mutual company, and I suppose the

dividends arise from the nett earnings of the company. After placing a certain amount to the surplus fund the nett profits make up the dividends and go to the members.

The plaintiff then introduced Miss BETTY VAUGHAN, a sister of Mrs. Hendren, the plaintiff, and at present a resident of Baltimore, who testified as follows:

In 1861 I lived a part of the time in Williamsburg, part in Norfolk, and the latter part of '61 and first of 1862 in Richmond, at which latter place I continued to reside up to August, 1862. I had conversations once or twice with Mr. Vaughan about the policy of insurance while I was in Richmond. I asked him if it would be possible for Mr. Hendren to keep up the policy. He said, "Yes; certainly."
He did not at that time refer to any agreement with Mr.
39 Hendren. He said he had the means to pay the premiums. I said if he had not the means, I had some money of mine which he could use. This was in the latter part of 1861. At any time, if the premiums had been wanted, I had the money, but Mr. Vaughan, never called on me for any. I never heard Mr. Vaughan speak again about the matter until after the death of Mr. Hendren, when he told Mrs. Hendren she need not be uneasy; it would be all right so soon as communication was opened. I heard my brother, Mr. Vaughan, repeatedly say he was determined the policy should be kept up. I heard him tell my sister, Mrs. Hendren, the same thing in 1862. I lived in Mrs. Hendren's house in Richmond at that time; it was after she had removed to Richmond, and so lived until the death of Mr. Hendren. R. H. Vaughan was stationed at Richmond at the same time; lived in same house with me, and was not absent a week while I was there. He was in the commissary department of Confederate States. Mr. Hendren came to Norfolk once only after he removed to Richmond, but never went South that I know of. Mr. Hendren was in the office of Col. Groner, writing for him, as I understood. Mr. Hendren moved to Richmond in January, 1862. My sister, Mrs. H., followed in the spring—April, perhaps. Mr Hendren resided in Norfolk in 1861. Mr. W. T. Hendren and R. H. Vaughan were both natives of Virginia. I was in Norfolk when Hampton was burned in 1862. The battle of Bethel was fought June 10th, 1861, and Hampton was then in Federal lines. Captain R. H. Vaughan was at the battle of Bethel. Confederate and Va. bank money the currency in Richmond in 1862, but I saw gold and silver in the hands of some parties.

And Mrs. LAVINIA VAUGHAN, another witness, testified as follows:

I live 6 miles from Hampton; am widow of R. H. Vaughan. I lived in Williamsburg from the 8th of May, 1861; before that time lived in Hampton. I heard Mr. Vaughan speak of the premiums of this policy. He said he was determined the policy should be kept up after Mr. Hendren's health began to fail, in the latter part of 1861 or in 1862. I do not remember the particular time. I was away from him a great deal of time, and saw but little of him after the war began. I never heard Mr. Vaughan say in 1861 or 1862 that he had paid up the premiums; do not know whether any money was advanced by any of Mrs. Hendren's relations for the purpose of paying those premiums. I lived in Mecklenburg while Mr. Vaughan was at Richmond. I moved to Mecklenburg shortly after the surrender of Yorktown. When I was in Mecklenburg Captain Vaughan was stationed in Richmond. From

Mecklenburg I moved to Petersburg. I lived in Mecklenburg when Mr. Hendren died. I had my children with me, and was keeping house at that time, and that was my home as long as I stayed there. I never kept house in Richmond. My husband was in the commissary
40 department, in Richmond. I was in Mecklenburg at the time Mr. Vaughan said he was determined to keep up the policy. I do not know whether Mr. Vaughan carried on his insurance business in Richmond while he was there; never heard anything about it. When he left home he did not go on insurance business. He went with the army. My husband had no insurance office in Richmond that I know of; never knew of his taking any premiums from any one during the war. He was not in the habit of telling me the details of his business. The reason I know of Mr. Hendren's policy was because he was in the family. Some of his papers and books were found after the war, and some were destroyed. When I got the chest containing my husband's papers it had been broken open, and a great many papers were taken out. I got my lawyer, Mr. Tabb, to examine the box, and he threw out all these insurance papers. I do not know whether there were any more receipts in the box than those here produced on trial. A great many letters were in the box. After the war a letter came directed to my husband, R. H. Vaughan, from the company, on the business of the company. I gave the letter to my lawyer, Mr. Tabb, and do not now know what has become of it. This paper (account with Mr. Vaughan, for which see page 34 of this record) was among the papers found. Dr. Vaughan got that paper from me a few weeks ago. Mr. Vaughan and Mr. Hendren were both natives of Virginia.

Capt. J. B. JONES, another witness on the part of the plaintiff, testified as follows:

I resided in Elizabeth City County in 1861; knew William T. Hendren and R. H. Vaughan—Hendren since 1850 or 1851, and Vaughan since I was a small boy. Vaughan was a native of Elizabeth City County; lived there until about the 8th of May, 1861, then went with the army to Yorktown, in York Co., Va. He at that time sent his family to Williamsburg. Hendren lived in Norfolk in 1861; was in Norfolk when I went to Yorktown in May, 1861. I was insured in this company; had been three or four years before the war. Some time between 8th May and 17th June, 1861, at which date my premium was due, I went to Vaughan to pay my premium, at Bethel. Vaughan refused to receive it, because I had forfeited it by going into the army. I know nothing of any payment of premium on Hendren's policy. I asked Mr. Vaughan if Hendren had forfeited his policy, at the time I offered to pay my premium. He replied there was nothing due on it, and that he had not forfeited it. I told him to let me know before he allowed it to expire for want of money; that I would pay the premiums at any time it was necessary. He replied he would let me know if it became necessary, before it did expire, but he never called on me. I had plenty of means for that purpose. Once, some time in 1862, Mr. Vaughan had $600 of my money in hand. He had sold a negro of mine, and had the money
41 in his hands some months before I knew of it. In April or May I first knew he had it; it remained in his hands about two months. He then paid it over to me. I loaned a small amount of money to Mr. Hendren in Jan'y, 1862, which he intimated to me was for the purpose of paying his premiums. I did not, during the war, at any other time, lend him any money for that purpose. I had frequent conversations with Mr. Vaughan on the subject of Mr. Hendren's policy, because it

was a matter of interest to us, both on account of our relations and the state of his health and the condition Mrs. Hendren would be left in; and we saw he must soon die. These last conversations took place in 1861 and 1862, and always left me under the impression that it was all straight so far as he, Vaughan, knew. I had another conversation with Vaughan after Mr. Hendren's death, about October, 1862, in War'enton, N. C., at my house, when he stayed one night on his way to Mecklenburg. I asked him if that policy had been kept up. He said it had been kept up and was all right, and the money would be forthcoming as soon as communication was opened. He said nothing about receipts, or having sent the money to New York. Hendren and Vaughan were both natives and residents of Virginia, and neither of them left during the war. I married a sister of Mr. Vaughan and sister of Mrs. Hendren.

And here the evidence on the part of the plaintiff closed.

The defendant then, on their part, here introduced the acts of incorporation of the New York Life-Insurance Company, showing that the said company was duly incorporated in the year 1849, under the laws of the State of New York, with its home office in New York City, and that the said company is a mutual company. And the defendant also introduced, by virtue of an agreement between the parties to this suit, the statement of V. D. Groner, which is as follows, to wit:

Col. V. D. GRONER testifies that he was regularly commissioned as captain and assistant adjutant-general of the Confederate States army in 1862, during the first months of that year; was afterwards commissioned, in July, 1862, a colonel, though I afterwards accepted a lieut. col.'s commission of cavalry. Wm. T. Hendren served under me as a clerk in the adjutant-general's office in Richmond, where I was on duty several months just about the time or just before the evacuation of Norfolk, which occurred May 10, 1862, and received wages at the rate of $90 per month. As ass't adjutant-general I had charge of the organization and appointment office. Mr. Hendren was never a commissioned officer, or in the military service of the Confederate States; that he gave this situation to Mr. Hendren for the purpose of giving him some occupation. His duties were purely clerical. He wore no uniform, was not subject to military orders, and could have resigned his situation
42 with me at any time he pleased. His health was very feeble during the time he was writing for me; that the duties of the witnesses, while assigned to the office of the adjutant-general, were only clerical.

V. D. GRONER.

The occasion of Mr. Hendren's having been in North Carolina, to which witness referred in speaking of Mrs. Hendren, was in Feb'y, 1856, and did not know of his having been in the State at any time afterwards.

V. D. GRONER.

And the defendant here introduced the commission and testimony of Theodore M. Banta, the exceptions therein taken being waived by the plaintiff, as follows, to wit:

Deposition of witnesses taken the 5th day of October, A. D. 1870, *at the office of the New York Life-Insurance Company, Nos.* 346 *and* 348 *Broadway, in the city of New York.*

Present, John M. Bolling, counsel for plaintiff; E. B. Hinsdale, counsel for defendant.

The direct examination of the witness here closed, and the plaintiff's counsel proceeded to the cross-examination as follows:

1st q. Do you mean by your answer to the sixth question to state absolutely of your own knowledge that Henrietta Hendren, or any one on her behalf, paid none of the premiums on the policy referred
45 to, due on the 25th days of May, August, and November, 1861, and February and May, 1862, respectively, to this company or to any of its agents?

A. Know of my own knowledge that she did not pay them to the company or to any agent authorized to receive them.

2nd q. Upon what is your knowledge based?

A. Upon my position in the company at the time.

3d q. Might not Henrietta Hendren have paid a premium to R. H. Vaughn without your personal knowledge?

A. Not according to the terms of the policy.

4th q. Nevertheless, an amount of money equal to the premium on the policy might have been paid by Henrietta Hendren to R. H. Vaughn without your personal knowledge, might it not?

A. Yes.

5th q. Did I not understand you to say that R. H. Vaughn was the agent to whom the premiums on this policy were payable?

A. Yes; on producing a receipt of the company signed by the president actuary.

6th q. In eighteen hundred and sixty-one and eighteen hundred and sixty-two, what was your employment in the company?

A. Mathematician and examiner and auditor of agents' accounts.

7 q. Was it your duty, as such mathematician and examiner of agents' accounts, to receive the payments of premiums on policies?

A. No.

8th q. Did you, in the years 1861 and 1862, keep the books in which entries of premiums paid on policies were made; and, if so, upon what were such entries based?

A. I kept the books wherein the entries of premiums payable to agencies were made. Those entries were based upon accounts rendered by agents themselves.

Adjourned, by consent of counsel, until 6th of October, at the same place, 2 o'clock p. m.

Adjourned, by consent of counsel, until 7th October, at the same hour and place.

OCTOBER 7TH, 1870.

Present: John M. Bolling for plaintiff, and E. B. Hindsdale for defendant, when the cross-examination of Theodore M. Banta was resumed:

9th q. Have you any other knowledge as to the payment or non-payment of the premiums payable on this policy, eleven thousand two hundred and seventy-three, subsequent to February 25th, 1861, or as to the receipt or non-receipt of said premiums at the office in New York, except such knowledge as you have derived from your examination of agents' accounts?

A. I have knowledge derived from the examination of the books of the company.

10th q. Were the books you refer to in this answer the books previously spoken of by you in this examination as books the entries in which were made by you, and based upon agents' accounts?

46 A. They were those books and other books.

11th q. What were the other books?

A. The policy-registers.

12th q. Were those books kept by you?

A. No.

13th q. Is it a part of your duty, as officer of the company, to examine proofs of death presented to the company?

A. Yes, during the absence of the president; and these proofs in question came in during his absence.

14th q. Have you the custody or control of the proof in this case, of the death of William T. Hendren, presented to the company?

A. They are in the hands of our counsel in Norfolk.

15th q. Of what did they consist?

A. An affidavit from Mrs. Hendren, and one of Miss Vaughn. I think that was all.

16th q. Was there a notice of death?

A. Her lawyer enclosed these affidavits of his death. I have not a copy of that letter; and that letter is in the hands of our counsel at Norfolk.

Redirect examination by counsel for defendant:

1 q. You stated in your cross-examination that agents were authorized to receive money only when they could deliver the renewal receipt, signed by the president or actuary. State briefly how the company transacted business with agents, and especially with this agent, Vaughn.

(Objected to by plaintiff's counsel.)

A. We would forward renewal receipts for premiums becoming due at various agencies, which receipts were signed by the president or actuary, and require' to be countersigned by the agent, in order to be valid. The agent then was charged with the various receipts, and monthly accounts were required from the agent of all premiums paid at his agency; renewal receipts for premiums unpaid being returned for cancelment. These charges were made in an agency-book.

2d q. Was this course pursued with the agent Vaughn?

A. It was.

3d q. How often were renewal receipts sent out to this agent Vaughn?

A. Our practice was to send them a few days before premiums were due.

(Objected to by plaintiff's counsel as not being responsive.)

4th q. If premiums fell due every month at this agency, when, in the regular course of business, were the renewal receipts sent?

A. About or towards the close of the preceding month.

5th q. Were those receipts charged to him (Vaughn) at that time?

A. They were charged to his account in the agency-book.

47 6th q. Have you examined this agency-book recently? I mean the agency-book containing Vaughn's account?

A. I have.

7th q. Are there any entries there against him of renewal receipts sent to him for this policy, for premiums falling due at any date subsequent to February 25th, 1861?

A. No.

8th q. When renewal receipts had been sent to agents, and especially this agent, Vaughn, and their accounts had been received, showing the monies collected, what entries were made in this agency-book, if any?

A. The premiums paid in these account' were checke' and the date of payment entered.

9th q. Did you make these entries?

A. I did.

10th q. Was that your duty in 1861 or 1862?

A. That was a part of it.

11th q. When was the last renewal receipt entered in this book in Vaughn's account for this policy?

(Objected to by plaintiff's counsel unless Vaughn's account is produced, and calls for production of Vaughn's account.)

A. February 25th, 1861.

Recross-examination by plaintiff's counsel:

1 q. What did you have to do, in the regular performance of your duty as an officer of this company, with the transmission of renewal receipts to the agents of the company?

A. Nothing.

2d q. How do you know that renewal receipts, then, were sent to Vaughn?

A. Because they are charged in his account.

2d q. Upon what is the entry of such a charge in his account based?

A. The renewal receipts are made in a book, the receipt being on the right hand of the page and the substance thereof on the left hand of the page, in what we call a stub; the receipt written on the right hand of the page is torn off and sent to the agent, and the entries into the agency-book are made from the entries in the stub.

3d q. Did you make the entries in the stub?

A. No.

Re-redirect examination resumed by the defendant's counsel:

1st q. Are the stubs of these entries for the years 1861 and 1862 preserved by the company, as forming any part of their accounts for that period?

A. No.

THEO. M. BANTA.

48 And this was all the evidence introduced in this suit.

Thereupon the plaintiff, by her counsel, offered the following instructions by the court, to wit:

Plaintiff's instruction.

The plaintiff prays the court to instruct the jury on the pleadings and evidence that, if they believe that the policy of insurance offered in evidence was executed by the defendant and signed by the president and actuary of said defendant and delivered to the plaintiff, and that the William T. Hendren referred to in said policy died on the 15th or 18th of August, 1862, and that due notice and proof of the death of said William T. Hendren were served on the defendant more than eighty days before the institution of this suit, and should they find that from the date of said policy up to the time of his death the said William T. Hendren did not pass beyond the settled limits of the United States that lie east of the Rocky Mountains, and did not, during the said period, visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Kentucky or Virginia, and did not, within the said period, enter into any military or naval service whatever, the militia not in actual service excepted, and shall further find that the said William T. Hendren did not die in or in

consequence of a duel, or by the hands of justice, or in the known violation of any law of the United States, or of any State or county, and shall further find, should they believe him to have died as testified to, that his death was not caused by intoxicating drink or opium; and further, that the declaration made by the plaintiff on the 20th August, 1856, should they find such declaration to have been made, and at that time, was not in any respect untrue; and further, that the plaintiff, or some one on her behalf, did pay the several premiums as set forth in said policy to the defendant or its agent for that purpose, on or before the several days mentioned in said policy for the payment thereof, up to the time of the death of said Hendren as certified; and shall further find that all conditions and things to be complied with and performed by the said William T. Hendren and the plaintiff, respectively, have been complied with and performed by them, respectively, and that the sum of $5,000 mentioned in said policy, nor any part of it, hath been paid to the plaintiff, then the plaintiff is entitled to recover the said sum of $5,000 with interest on the same (should the jury see fit to allow it) from the end of sixty days after they may find due notice and proof of the death of said William T. Hendren to have been given to the defendant, should they find from the evidence the due notice and proofs aforesaid to have been so given, and death to have occurred as testified to.

And the defendant offered, by its counsel, the several instructions following, marked respectively from 1–23 inclusive:

49 *Instruction No. 1.*

That in contemplation of law, war existed between the United States and the Confederate States from 19th Aug., 1861, and that war dissolved the agency of Vaughan for defendant, and therefore the plaintiff cannot recover, unless the jury find that the defendant did actually receive all the premiums on the policy of insurance given in evidence which became due prior to the death of Mr. Hendren, and any agreement which Mr. Vaughan made after the commencement of the war to pay the premiums is no evidence of such payment unless the jury further find that said Vaughan did actually transmit the premiums to the defendant or in some manner account to them for the same.

Instruction No. 2.

That the war revoked the agency of R. H. Vaughan for the defendant, and that as to the premiums falling due on the policy after the 16th day of August, 1861, no agreement of said Vaughan with the plaintiff or her husband, whether made before or during the war, could bind the defendant.

Instruction No. 3.

That if the jury find that R. H. Vaughan, agent of the defendant, did, from the year 1861 to the time of his death, engage in actual hostilities with the United States by joining the army of the Confederate States, then his agency ceased from the year 1861, and the plaintiff is not entitled to recover, because there is no sufficient evidence of any payment of the premiums on the policy of insurance given in evidence after the year 1861, to the death of said Hendren.

Instruction No. 4.

That if the jury find that from the commencement of hostilities, about April, 1861, until his death in Feb., 1864, R. H. Vaughan, who was agent of the defendant, was in actual service of the confederate army, and a combatant against the United States, then his agency terminated at the time of his entering that service, and none of his acts thereafter bind the defendants, unless known to them and assented to by them, of which there is no evidence.

Instruction No. 5.

That if the jury find that at the time the policy of insurance given in evidence in this case was effected, Mr. and Mrs. Hendren were citizens of Virginia and residents of the city of Norfolk, in said State, and R. H. Vaughan, the agent of the defendant, was a citizen of Virginia and a resident of Hampton, in said State, at that time and afterwards, until the commencement of hostilities between the United States and the Confederate States, and that said hostilities commenced in the year 1861, and that on the 10th of May, 1862, or before Norfolk and Hampton, and also Yorktown—at which latter place said Vaughan then was—fell within the lines of the United States, and that the said Mr. and Mrs. Hendren and Vaughan all voluntarily removed at that time or shortly prior thereto to the city of Richmond and voluntarily placed themselves within the lines of the confederate government, and thus avoided the consequences which would have ensued if they had remained, viz, that they both would have been within the lines of the United States, and the said Vaughan had, from the commencement of hostilities as aforesaid until the time of his death, been in the service of the Confederate States, in the army, that then said Vaughan could not, after said 10th May, 1862, be considered the agent of the defendant, and any dealing with him after that date by either Mr. or Mrs. Hendren, or payment to him of premiums, could not bind the company, and if premiums could have been by said Mr. or Mrs. Hendren paid to the agent of the defendant at Norfolk, or transmitted to New York, if they had remained in Norfolk, and that by reason of said removal of said Vaughan and Mr. and Mrs. Hendren the premiums coming due on the 25th May, 1862, could not be paid to the defendant, and has in fact never been paid to the company, then the plaintiff cannot recover.

Instruction No. 6.

That if the jury believe that R. H. Vaughan changed his residence without the knowledge or consent of the defendant, from Elizabeth City County to Richmond City or Mecklenburg County, such removal did not carry with it the agency for the defendant, and said Vaughan had no authority by virtue of his appointment as agent at Eliz. City County to act as such at Richmond City or Mecklenburg County.

Instruction No. 7.

If the jury shall believe from the evidence in this case that R. H. Vaughan made an agreement with the plaintiff or with Wm. T. Hendren to the effect that he (Vaughan) would see to the payment to be made on said policy for premiums due on the 25th days of May, August, and November, 1861, and on the 25th days of February and May, 1862, and

keep the said policy of insurance in full power and effect; that the said R. H. Vaughan then became for that purpose the agent of the said plaintiff, and as such agent of the said plaintiff no evidence of the fact of said payment based on the declaration of the said R. H. Vaughan can bind the defendant, unless the defendant had full knowledge of the facts of said agreement, and ratified and confirmed the same.

51 *Instruction No.* 8.

If the jury shall believe from the evidence that Wm. T. Hendren made an agreement on behalf of the plaintiff with R. H. Vaughan for the payment of several premiums due on the 25th days of May, August, and November, 1861, and the 25th days of February and May, 1862, and that the only evidence of payment are the declarations of said Vaughan made to said plaintiff in pursuance of said agreement, they shall find for the defendant.

Instruction No. 9.

That if the jury find that the plaintiffs did not obtain from the company receipts for the premiums which fell due on the 25th days of May, August, and November, 1861, and on 25th days of February and May, 1862, signed by the president or actuary, then the plaintiff is not entitled to recover, notwithstanding they may find that she obtained receipts signed by R. H. Vaughan, unless the defendant in some manner ratified said payments to Vaughan.

Instruction No. 10.

That during the war the defendant itself could have no kind of business communication or intercourse with the plaintiff in the confederate lines, unless specially licensed thereto by the United States Government, and that the defendant could not do by an agent what it could not do by itself.

Instruction No. 11.

If the jury shall believe from the evidence that from and after the 19th day of April, 1861, communication ceased between New York and Norfolk and Hampton, in Virginia, in consequence of the war, then the New York Life-Insurance Company were excused from sending renewal receipts to their agents in Virginia until communication was re-opened, even though the jury may find it had been the custom or was the duty of the said company to send such renewal receipts before the commencement of said war.

Instruction No. 12.

If the jury shall believe from the evidence that at the time of making the policy of insurance on the 25th day of August, 1856, the said William T. Hendren and Henrietta Hendren, the plaintiff in this suit, were residents of the city of Norfolk, and the State of Virginia; that afterwards the said William T. Hendren removed to and resided in the town of Hampton, in the State of Virginia, up to the year 1861, during all which time there was open communication between the city of
52 *York*, the home-office of the defendant, and the said cities of Nor-

folk and town of Hampton; that in April, 1861, the said communication between New York and the said city of Norfolk and town of Hampton was cut off by the existence of the war then pending between the United States and Confederate States; that shortly after, or about the beginning of said hostilities, the said Wm. T. Hendren and Henrietta Hendren removed from the said town of Hampton to the city of Norfolk; that the communication between the said town of Hampton and city of New York was resumed on June, 1861; that afterwards, in January, 1862, the said William T. Hendren removed from the city of Norfolk to the city of Richmond, and there continued to reside up to the time of his death; and afterwards, some time in April or May, 1862, just before the evacuation of the city of Norfolk, the said Henrietta Hendren removed to the said city of Richmond, to reside there with her husband, the said Wm. T. Hendren, and did so reside to the time of his death; that afterwards, on the 10th of May, 1862, the said city of Norfolk was evacuated by the confederate forces, and occupied by the Federal troops, and that communication between the said city of New York and city of Norfolk was thereby resumed; and that the said Wm. T. Hendren and Henrietta Hendren, by so removing to Richmond, removed themselves further from direct communication with the city of New York, and rendered the same impossible by remaining in Richmond, and within the confederate lines, whereas they might have been in communication with the city of New York, by remaining in either the city of Norfolk or the town of Hampton, then the said defendant is, in contemplation of law, excused from sending either notices of the times of payment or receipts signed by the president or actuary, or from doing any other thing by them to be done and performed on their part, for the purpose of keeping the said policy of insurance in force; and from and after such removal to points within the confederate lines, all communication between the said Vaughan and Hendren and the said company was illegal.

Instruction No. 13.

If the jury shall believe, from the evidence, that the New York Life-Insurance Company is a mutual company, duly incorporated under the laws of the State of New York, then the said Henrietta Hendren, the holder of a policy on the life of Wm. T. Hendren, was a member of said company, as a partner, and being such partner, her rights in said company accruing after the 19th day of April, 1861, were revoked by the declaration of war, provided the said Henrietta Hendren at that time was a citizen and resident of Va., and continued to reside in the lines of, and to be subject to, the confederate government at Richmond, until the death of her husband.

53 *Instruction No.* 14.

If the jury believe, from the evidence, that the New York Life-Insurance Company was a mutual company, and that the plaintiff was a policy-holder therein, then the plaintiff was bound by all the laws and regulations of the company, and the acts of the company were her acts, and she was bound to know that R. H. Vaughan had no authority, as agent, to receive the payment of premiums without the receipt signed by the president or actuary, (and that any payment, or agreement for payment, of the premiums on her policy, without the delivery to her of the said receipt, would not bind the company, unless the said premiums were actually paid to the said company as they fell due,) and that the

said Vaughan, as agent, had no authority to make any agreement for payment of the premiums that would bind the company, unless the premiums were promptly paid as they fell due.

Instruction No. 15.

That if the jury believe, from the evidence, that the New York Life-Insurance Company did not receive the premiums falling due on the policy during the war, they must find for the defendant, notwithstanding they may believe that the payments were made to Vaughan.

Instruction No. 16.

That, in legal contemplation, a war existed between the United States and the Confederate States from 16th August, 1861, until after the year 1864; that a corporation, incorporated by the State of New York, must, for the purposes of this suit, be considered a citizen of the United States, and a citizen and resident of the State of Virginia during the late war must be considered a citizen of the Confederate States; that no commercial intercourse was lawful between any of the citizens of the United States and any of the citizens of the Confederate States during the war between them, without license of the governments of those States respectively, and there being no evidence of any such license in this case, the jury cannot presume that Vaughan did transmit the premiums on the policy of insurance given in evidence, or in any manner account for them to the defendant, without positive evidence of that fact.

Instruction No. 17.

That during the war the defendant itself could have no kind of business communication or intercourse with the plaintiff in the confederate lines, unless licensed by the U. S. Government, and that the defendant could not do by an agent what it could not do by itself.

54 *Instruction No.* 18.

The court instructs the jury that if they believe, from the evidence in this case, that there was printed on the margin of the policy of insurance offered by the plaintiff in evidence in this cause these words, "All receipts for premiums paid at agencies are to be signed by the president or actuary," and that the premiums on said policy due respectively on the 25th days of May, August, and November, 1861, and on the 25th days of February and May, 1862, by any arrangement or agreement between the assured and R. H. Vaughan, were paid to him without the knowledge or assent of the defendant, in any manner otherwise than in accordance with the said words on said margin, then they shall find for the defendants.

Instruction No. 19.

If the jury believe, from the evidence, that the alleged agent, R. H. Vaughan, received the premiums due on the 25th days of May, August, and November, 1861, and February and May, 1862, without receipts signed by the president or actuary of the New York Life-Insurance Company, they shall find for the defendant, unless they believe that

the said company, with full knowledge of all the facts of said payment, afterwards fully ratified and confirmed the same.

Instruction No. 20.

The court instructs the jury that if they believe from the evidence that an agreement was made by the assured with R. H. Vaughan as to the payment of the premiums on said policy of insurance, in evidence, which fell due on the 25th days of May, August, and November, 1861, and February and May, 1862, other than upon the receipt signed by the president or actuary of the company, and that the said defendant knew nothing of said agreement, then they shall find for the defendant, unless they further believe that the said defendant afterwards, with full knowledge of all the circumstances, ratified and confirmed the said agreement.

Instruction No. 21.

If the jury shall believe from the evidence that the payments alleged to have been made by the said Henrietta Hendren, or by any person for her, as and for her premiums due on the 25th days of May, August, and November, 1861, and February or May, 1862, to the said R. H. Vaughan, as the agent of the defendant, were not made in gold and silver, or other legal tender of the United States, they shall find for the defendant.

Instruction No. 22.

If the jury shall believe from the evidence that V. D. Groner
55 was a captain in the adjutant-general's office of the Confederate States of America, and that the said Wm. T. Hendren was at any time, after the making of the policy of insurance given in the evidence in this case, in the employment of said V. D. Groner, as a clerk, then they shall find for the defendant.

Instruction No. 23.

That if the jury find that Wm. T. Hendren, after the execution of policy of insurance given in evidence, was employed as a clerk in the office of the adjutant-general of the Confederate States, said employment is in legal contemplation an entering into military service, within the meaning of said policy, and the plaintiff is not entitled to recover.

And thereupon the court granted the instruction of the pla ntiff, and rejected the instruction of the defendant, except 12, which was granted, and the court having modified the 7th instruction, gave it thus, as follows, to wit:

If the jury shall believe from the evidence in this case that R. H. Vaughan made an agreement with the plaintiff, or with Wm. T. Hendren, that he, Vaughan, would see to the payments to be made on said policy for premiums due on the 25th days of May, August, and November, 1861, and on the 25th days of February and May, 1862, and keep the said policy of insurance in full force and effect, that the said R. H. Vaughan then became for that purpose the agent of the said plaintiff. Notwithstanding this, if Vaughan was agt. for deft., to receive premiums on policies, his declarations as such agent, that premiums were paid, are proper evidence to go to the jury on issue raised in pleas of deft.

To which opinion of the court, granting the instruction of the plaintiff and rejecting the instructions offered by the defendant numbered severally and respectively 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and modifying the 7th instruction, and giving it as modified, the defendant, by its counsel, excepted, and prayed that this its third bill of exceptions may be signed, sealed, and enrolled, which is accordingly done, on this the 23d day of February, A. D. 1871.

W. H. BURROUGHS. [SEAL.]

And now, on this day, to wit, at a corporation court, held for the said city, on Tuesday, February 28th, A. D. 1871:

Came the parties, by their attorneys, and the defendant, pursuant to leave heretofore given, tendered his bill of exceptions to the ruling of the court, in overruling its motion for a new trial, which was received, signed, and sealed, and ordered to be made a part of the record in this cause, as follows, to wit:

56 Be it remembered, that after the jury were sworn to try the issue joined in this suit, and had heard all the evidence adduced by the plaintiff and defendant respectively, the jury, upon the case being submitted to them, returned a verdict in these words. (For verdict of jury see page 14 of this record.) Which said verdict of the jury the defendant by counsel moved to set aside, and *and* grant a new trial, upon the following grounds: 1st. That the court misdirected the jury in granting the instruction prayed by the plaintiff, in refusing the instructions prayed for by the defendant, and in giving the instruction No. 7 of the defendant as modified by the court, all which said instructions are set out in bill of exceptions No. 3 of the defendant, to which reference is hereby made, and said instructions prayed to be taken as a part of this bill. 2d. Because the said verdict is contrary to evidence. 3d. Because the said verdict is contrary to the weight of evidence: and 4th. Because the evidence was insufficient to warrant the said verdict. But the court overruled the motion, and refused to set aside the verdict and grant a new trial. To which ruling of the court the defendant, by counsel, excepted, and tendered this their bill of exceptions, which they pray may be signed and sealed by the court, and made a part of the record in this cause, and the same is accordingly done.

The court certifies that the following were the facts proved on the trial: That the plaintiff effected a policy of insurance with the defendant on the life of her husband, Wm. T. Hendren, which policy was in the words and figures as set forth in bill of exceptions No. 2, of the defendants, to which reference is made and is hereby made part hereof; that said Ferguson proved the policy, and that he was the agent of the defendant in Norfolk, Virginia, at the time of the execution of this policy, and the plaintiff received the policy through him; that the witness Ferguson, then the agent of the defendant, had delivered to W. T. Hendren a receipt for the premium due Feb'y 25th, 1858, signed by the president and countersigned by Ferguson; said receipt is in words and figures as set forth in bill of exceptions of the defendant, No. 2, to which *is made* and is hereby made a part hereof; that the money for the said premium had never been paid to witness, but that witness took the check of said Hendren for the premium, which said check is in words and figures as set out in the bill of exceptions of the defendant, No. 2, to which reference is made, and is hereby made a part hereof; that the witness had already accounted for the said February premium when he took the said check, and that said check was never paid; and witness

identified another receipt, dated August 25th, 1858, signed by the president of the New York Life-Insurance Company, and by R. H. Vaughan, then agent of the defendant, at Elizabeth City County, which receipt is set out in the defendant's 2d bill of exceptions, to which reference is made and hereby made a part hereof; and the witness also proved a printed notice to Mr. Hendren that his premium was due, dated July, 1860, to be in the usual form of those sent by defendant to him,
57 which said notice is set out in the defendant's bill of exceptions, No. 2, to which reference is made and hereby made a part hereof; that R. H. Vaughan was agent of defendant in Hampton, but it was not proved when Vaughan became agent; that monthly settlements were made with the defendant by Ferguson; that he deposited the money received in payment for premiums in a separate account in bank; that he paid the company by draft on New York after deducting his commissions, and did not transmit the same money that he received; that the company sent receipts for the premiums, signed by the president of the company, and then the witness countersigned and delivered them. Some of the insured paid in cash, and some in notes—that is to say, forty per cent. notes and 60 per cent. cash; that it was usual to send out notices, but not a universal rule; that the company usually sent the notices and the receipts together; that Ferguson was local agent for Norfolk City and adjoining counties; that he took a good many risks in Elizabeth City County, but transferred them to R. H. Vaughan when he became agent; that he, as agent, had no authority to receive money from any party, unless he had receipts; that such receipts were not, in the opinion of the witness Ferguson, valid, unless signed by the president or actuary of the company, and the company did not hold itself bound by anything else; that Ferguson, as agent, had no authority to alter contracts; that Ferguson would in many instances pay the company before parties owing premiums had paid him, but in such cases he always gave the parties the regular receipts; that the company required the return of the receipts, or the money for them; that, if witness parted with the receipts, the company held him liable; that witness had one thousand dollars, more or less, of due-bills given to him by parties insured, for premiums which had never been paid, but he always gave the company's receipts when the parties gave their due bills to him individually, and these were private debts, and as soon as the company's receipts went out of his hands he charged himself in account with the company; that, when the war broke out, the company ceased sending him receipts; that, after the war, witness continued to act and to attend to some little business for the compano; that the company then ceased sending renewal receipts on policies of insurance, because communications were stopped; that witness continued to act and delivered all receipts for premiums which had been sent him prior to the war, and received the money for them, except such as were returned to the company after the war; that the company had but little business, during the war, in Norfolk—such as they had, witness attended to; that the company continued to correspond with witness after the war; all their correspondence related to business of the company; communication was opened in May, 1862; that witness did not renew any policies during the war after he had delivered the receipts sent him in April, 1861, because he had no right to do so; that several persons, during the war, claimed the right to pay their premiums, and
58 some did so, in confederate and Virginia bank money, and witness received the money in each case and gave them receipts for it, conditioned upon the ratification of the company; that witness made

special deposits of each sum so paid him, and has paid it all back to the parties; that the communication witness had with the company after the evacuation, was in reference to some policies which had been paid up, and the parties had died, in relation to some scrip, and in relation to his April, and perhaps May, 1861, accounts; that witness had not accounted to the company for the April and May, 1861, receipts sent him before communication was closed, because communication was closed before he was ready to account; these receipts had been charged to witness by the company, and he had collected the money on many of them. The first communication after communication was opened was from the company to witness; that several letters passed between them; that witness was taken up before General Viele, then commanding in Norfolk, about one of these policies, that of Mr. Griffith, referred to in one of these letters. When communication was opened the company did not discontinue the agency of witness. He received a letter in reference to the receipts they had sent him, and thanking him for his promptness; they did send him any specific revocation of his authority; these letters were received by witness from the company; they were directed to witness individually; they are agency letters; (the said letters are marked A, B, C, and D, and dated respectively, July 10th, 1862; October 16, 1862; December 12, 1862, and Jan'y 27, 1863, and are set out in bill of exceptions No. 3 of the defendant, to which reference is made, and the letters are hereby made a part hereof;) that the word agent in letter B refers to the witness; the witness also proved an account for renewal receipts with him, made out by the company, received by mail from New York after the evacuation of Norfolk, and that it was the statement referred to in the letter of October 16th, 1862; that witness had not made the last return due, before communication was stopped; that he could not make the return on that account; (the said account, marked "E," is set out in the bill of exceptions No. 3 of the defendant, to which reference is made, and the said account is hereby made a part hereof;) that the entries on the margin, on the right hand of that account under "charges," represent settlements made when Mr. Bloss, the agent of the company, sent on by the company after the evacuation of Norfolk, settled the same with witness; that the receipts marked on said account, returned, were not delivered to the policy-holders entitled to them, because not called for; they were charged to witness in his account for April, 1861, and he returned them as a credit on his account. Some of these receipts, though not delivered to parties insured, were not returned, because mislaid as marked; they were in witness's desk, and some Federal soldiers, members of an Illinois regiment, broke it open and these receipts were lost; that R. A. Worrell died in April or May, 1861; that the entry on said account
"May 26," opposite Griffith's name, represents that his premium
59 became due at that date when it was paid, and carried his policy for the ensuing year, his being an annual premium; he died during that year, and his policy was paid; that the meaning of the words, "Paid by scrip deposited," on his account, is, that for several years scrip was, payable in cash; the dividends of the company were declared annually, and scrip was issued for these dividends to the policy-holders, with interest thereon, payable annually; and after the scrip had been issued five years, the company then took in the scrip issued for the first of the preceding five years, in part payment for the year's premium then due, or paid it in cash; that in the opinion of witness, Mr. Bloss made the entries on said account; that the "notes" referred to in said account were received by Ferguson in May, 1861, for the

parties; that he could not find Mr. Barry; that the memorandum on the back of said account is the instruction to agents; that agents receiving receipts were responsible for them, unless returned by the agent to be cancelled; that R. H. Vaughan was the same kind of an agent at Hampton as witness was at Norfolk; that witness received all the receipts he had when the war broke out—some time before that; that in every case in which witness did not have a receipt signed by the president or actuary, he gave his individual receipts to parties, and made a special deposite, as before stated; that one of the parties on witness's list rode down to Boush's Bluff, where witness was stationed, 3½ miles from Norfolk, to pay witness his premiums; that witness was captain of the Norfolk Juniors in January, 1861, and went into the confederate service with his company in 1861, and served until May, 1862, when, on the reorganization of the army, witness was turned out of office by his company; that the account marked "G" (this account is set out in defendant's bill of exceptions No. 3, to which reference is made, and hereby made a part hereof) is a statement from the company of dividends for that year with R. H. Vaughan; that the dividend due Mrs. Henrietta Hendren for that year, up to March, 1860, by that account, is $36; the dividend having been declared, it was Mrs. Hendren's; that whatever the policy-holder was entitled to on account of dividends declared, he was entitled to over and above the amount of the policy; that from the 1st of the following year after insuring the insured became entitled to a dividend; that the company, some years ago, declared a dividend of 50 per cent., afterwards 40 per cent., then 30 per cent., but never less than thirty per cent. after 1856. One year (before 1856) it did not declare any dividend. Mrs. Hendren was entitled to a dividend from 1st , 1857, for each year thereafter. That the witness did not receive any communication from the North during the war until after the evacuation of Norfolk, May 10th, 1862; that it was some time after that before letters passed; that his agency ceased after the war broke out, because the company could not send him the renewal receipts for premiums due on policies; that as agent during the war, he made only private arrangements with parties who claimed the right to pay the premiums;
60 that he returned the money in every case to the parties who so paid him; that one of the rules of the company was that he should not receive any money except upon printed receipts, signed by the president or actuary; that that was one of the rules of the company sent to their agents; that there was a general agent, Mr. Charles E. Wortham, at Richmond, and the other agents in the State were all local agents; that R. H. Vaughan was local agent for Elizabeth City County and vicinity; that Wm. T. Hendren was living in Norfolk City when he was insured; that witness took his insurance and collected the premiums up to 1858; the last premium on Hendren's policy which witness col'ected was that of February 25th, 1858; this was paid by witness; he delivered the receipt and paid the company. When Hendren moved from Norfolk to Hampton witness no longer collected his premiums, but transferred him to Vaughan's list, as he had moved to his locality. When Hendren moved back to Norfolk he was not put back on witness's list; witness was not advised of his coming to Norfolk; that Hendren did not, nor did any one for him, pay witness the premiums in 1861; that it would have depended on whether witness had the receipt for premium whether he would have gone to Richmond to collect the premium; if the company had sent him a receipt to collect a premium on policy of a person living in Richmond, he would have collected it if possible; that the company, so far as witness knew, was

a mutual company, and the dividends arise from the net earnings of the company, after setting aside a certain amount for the surplus fund; that the nett profits make up the dividends and go to the members. It was proved by Rev. Geo. F. Adams that he went to the office of the defendant, in New York, in the fall of 1868, October or November, as he had been requested to do by Mrs. Hendren; that he had obtained the date and number of the policy in question from the plaintiff; that he saw the president of the company, and told him that he had called to see about the policy; that the president called a clerk, and the clerk brought a book, and the president, after examining the book, said that the policy had lapsed some two or three months before Hendren died. The president said nothing could be done. He denied all liability; that the president seemed to know that Mr. Hendren was dead. He said nothing about notice. He said no compromise could be made, and the company could not pay any part of it. The witness had no authority to receive the money.

Upon cross-examination, the witness stated that the president might have stated that the policy had lapsed some months before Hendren died; but the time when it lapsed, the president stated, was some time in the spring of the year Hendren died.

It was proved by Dr. Wm. R. Vaughan, a physician residing in Hampton, that Mr. Hendren married his sister, the plaintiff; that Hendren's age was about the same as witness'es, who is now about 43 years of age; that R. H. Vaughan was the brother of witness, and agent of the New York Life Insurance Company; that Wm.
61 T. Hendren died in August, 1862; that said Hendren resided in Norfolk in 1856; that he left Norfolk in spring of 1862; that he never saw Mr. Hendren pay Mr. Vaughan any premiums; that witness'es sister, who died during the war, did loan Mr. Hendren money to meet a premium which became due prior to the war; that on one occasion R. H. Vaughan gave witness a receipt without his paying the premium, Vaughan paying the company and witness afterwards repaying him, witness being insured in the defendant company; that W. T. Hendren's health was bad in 1859; that he had consumption in 1862, and until his death; that witness was his attending physician in Richmond during the war, and that Doctors Crenshaw, Cabell, and Moore also attended him there; that said Hendren went to Richmond in January or February, 1862, and was employed in the office of Col. V. D. Groner, who was at that time in the adjutant general's office of the Confederate States. Hendren was a clerk in Groner's office; he never went into any other employment before his death. Witness knew that R. H. Vaughan's agency embraced the counties of York, Warwick, and Elizabeth City, but did not know whether it embraced other counties or not. Witness was examining physician for Vaughan's agency, and knew the insurances made and the residences of the parties at the time, but did not recollect any from any other than the counties named. R. H. Vaughan died in February, 1864. He was in the service of the confederate army; volunteered as a private in calvary command at the commencement of hostilities; was made a captain in 1861; served on General Magruder's staff; left Yorktown about May 3d, 1862, and went to Richmond; was an officer in confederate army until his death; that R. H. Vaughan was frequently at his home; that a chest of papers of R. H. Vaughan's was recovered after the war, which had been lost during the war.

It was proved by the plaintiff, Henrietta Hendren, that her husband, Wm. T. Hendren, was a practising lawyer, and that when he died,

which was August 18th, 1862, he was 33 or 34 years old. He had removed from Norfolk to Richmond in the beginning of the year 1862, and witness went to Richmond to join him about the last of April or 1st of May, 1862. The city of Norfolk and Hampton had fallen within the lines of the United States forces the 10 of May, 1862. R. H. Vaughan was the agent of defendant and brother of plaintiff; that her husband's health began to fail in 1861; that Mr. Vaughan had been in the habit of receiving the premiums on her policy and receipting for them, and that her husband gave a good many of his papers to said Vaughan before May, 1861, for safe custody; that at that time Vaughan was in the habit of attending to business matters for her husband; that the policy of insurance, receipts, and notices before produced were among the papers placed in possession of Mr. Vaughan, and were only recently recovered, Vaughan's papers having been for some time lost; that her husband and Vaughan made an agreement about the payment of
62 premiums on this policy in Hampton, and afterwards spoke of it on the same day in presence of the witness. Mr. Hendren's health at that time was very feeble, and he was anxious about the payment of these premiums; and R. H. Vaughan, the brother of the witness, told her husband in her presence not to make himself uneasy about these premiums; that he would attend to them himself, and see them properly paid up. The premiums he was speaking of were the premiums on this policy. It was afterwards to be settled between them privately. This conversation occurred before May 1st, or at least before May 25, 1861. The same thing was afterwards repeated to witness and her husband several times. Witness was uneasy about the premiums, and Vaughan afterwards frequently referred to the agreement as an agreement that he would himself become responsible to the company for the premiums as they fell due, and would settle the matter as an individual debt. W. T. Hendren was anxious and uneasy about the premiums because of his embarrassed circumstances pecuniarily, and this led to the agreement; that witness was anxious about the *the* payment of the premiums, and frequently asked her brother (Vaughan) if they were paid, and he always told her that they were paid, and that the policy was all right; and this was done at intervals up to Hendren's death; and the said Vaughan told the witness three days before Hendren's death that the premiums were paid; that he had attended to it, and that the policy was all right. After Hendren's death, the day after the funeral, witness asked Vaughan if she would get the insurance money of this policy, and he said yes; that there would be no difficulty about it after the war was over; that he would attend to it himself as soon as communication was opened; that two receipts and four notices, set out in defendant's bill of exceptions, No. 2, (to which reference is made,) and hereby made a part hereof, were among the papers given by her husband to Vaughan for safe custody, and were recovered several years after the war, when Vaughan's papers were found; that plaintiff never had more than one policy on the life of her husband; that witness gave her gold watch and chain to her husband, who gave them to R. H. Vaughan as security for the personal responsibility he assumed for Mr. Hendren. This was about the last of April or 1st of May, 1861. Vaughan gave back the chain to witness, saying he could fix it without the chain. The watch was never returned to the witness or her husband.

It was proved by Miss Bettie Vaughan, a sister of the plaintiff, that in 1861 the witness lived a part of the time in Williamsburg, part in Norfolk, and the latter part of '61 and first of 1862 in Richmond, at which place she continued to reside up to August, 1862; that she had

conversations once or twice with Mr. Vaughan about the said policy of insurance while she was in Richmond. She asked him if it would be possible for Mr. Hendren to keep up the policy, he said, "Yes, certainly;" he did not at that time refer to any agreement with Mr. Hendren; he said he had the means to pay the premiums. Witness told him
63 if he had not the means that she had some money which he could use; this was in the latter part of 1861; that she had the money at any time if the premiums had been wanted, but Vaughan never called on her for any; that witness never heard Vaughan speak again about the matter until after the death of Hendren, when he told Mrs. Hendren she need not be uneasy, it would be all right as soon as communication was opened; that she heard her brother, Vaughan, say repeatedly he was determined the policy should be kept up. She heard him tell Mrs. Hendren so in 1862, when she lived in Mrs. Hendren's house in Richmond, where witness lived until the death of Mr. Hendren; Vaughan was stationed at Richmond at the same time, lived in the same house, and was not absent a week while she was there. He was in the commissary department of the Confederate States service; Hendren went to Norfolk but once after he removed to Richmond, and never went South; that he was in the office of a Colonel Groner, writing for him; that Hendren moved to Richmond in Jan'y, 1862; Mrs. Hendren followed him in the spring; that Hendren resided in Norfolk in 1861; that W. T. Hendren and R. H. Vaughan were both natives of Virginia; that the battle of Bethel was fought June 10th, 1861, and Hampton was then in the Federal lines; that R. H. Vaughan was at the battle of Bethel as captain; that confederate and Virginia bank money were the currency in Richmond in 1862, but witness saw gold and silver in the hands of some parties.

It was proved by Mrs. Lavinia Vaughan, that she lived six miles from Hampton, and is the widow of R. H. Vaughan; that she lived in Hampton up to 8th of May, 1861, after that in Williamsburg awhile, and then moved to Mecklenburg County shortly after the surrender of Yorktown; that she heard her husband, R. H. Vaughan, speak of the premiums on this policy. He said he was determined the policy should be kept up after Hendren's health began to fail in the latter part of 1861 or in 1862; that she was away from her husband a great deal of the time and saw but little of him after the war began; that she never heard her husband say, in 1861 or in 1862, that he had paid up the premiums; that she lived in Mecklenburg County while her husband lived in Richmond, where he was stationed. From Mecklenburg, witness moved to Petersburg, where she was living when Hendren died; that she had her children with her and was keeping house at that time, and that was her home as long as she stayed there; that she never kept house in Richmond; that her husband was in the commissary department in Richmond; that she was living in Mecklenburg at the time Mr. Vaughan told her that he was determined to keep up the policy; that she did not know whether Vaughan carried on his insurance business in Richmond while he was there; that she never heard anything about it; that when he left home he did not go on insurance business but with the army; that her husband had no insurance office in Richmond that witness knew of; that witness
64 never knew of his taking any premiums during the war; that he was not in the habit of telling witness the details of his business; that the reason she knew of Hendren's policy was because he was in the family; that some of his books and papers were found after the war, and some were destroyed; that when witness got the chest containing her husband's papers it had been broken open and a great many papers

taken out; that witness got her lawyer, Mr. Tabb, to examine the box, and he threw out all these insurance papers; that witness did not know whether there were any more receipts in the box than those produced on the trial of this suit; that there were a great many letters in the box; that after the war a letter came addressed to her husband, R. H. Vaughan, from the company, on the business of the company; that she gave the letter to her lawyer, Mr. Tabb, and does not know what has become of it; that the account with Mr. Vaughan marked G, in words and figures as follows, (for said account see page 34 of this record,) was among the papers found; that Dr. Vaughan got that paper from the witness a few weeks ago; that R. H. Vaughan and W. T. Hendren were both native Virginians.

It was proved by Captain J. B. Jones that the said Jones resided in Elizabeth City County in 1861; that he knew Wm. T. Hendren and R. H. Vaughan; Hendren since 1850 or 1851, and Vaughan ever since he was a small boy; that Vaughan was a native of Elizabeth City County, and lived there until about 8th of May, 1861, then went with the army to Yorktown; he sent his family at that time to Williamsburg; that Hendren lived in Norfolk in 1861, was in Norfolk in May, 1861; that the witness Jones was insured in the New York Life-Insurance Company; had been insured three or four years before the war; that some time between the 8th and 17th of May (at which last date his premium became due) the witness went to Vaughan at Bethel to pay his premium; Vaughan refused to receive it, because witness had forfeited it by going into the army. At the time witness offered to pay his premium he asked Vaughan if Hendren had forfeited his policy; Vaughan replied that there was nothing due on it and that Hendren had not forfeited it. Witness told Vaughan to let him know before he allowed it (Hendren's policy) to expire for want of money; that he, witness, would pay the premiums at any time it was necessary; that Vaughan replied he would let him know if it became necessary before the policy expired, but that Vaughan never did call on him; that witness had plenty of means for that purpose; that at one time, some time in 1862, Vaughan had $600 of witness' money in his hands, which he sold a negro belonging to witness for; that he had it several months before witness knew it; that it remained in Vaughan's hands about two months and he then paid it over to witness; that witness loaned a small amount of money to Wm. T. Hendren in January, 1862, which he intimated to witness was for the purpose of paying his premiums; that witness had frequent conversations with Vaughan on the subject of Hendren's policy, because
65 it was a matter of interest to both of them on account of their relations and the state of Hendren's health, and the condition Mrs. Hendren would be left in at Hendren's death, and they saw that he must soon die; that the last conversations took place in 1861 and 1862, and always left witness under the impression that it was all straight, so far as Vaughan knew; that witness had another conversation with Vaughan after Hendren's death, about October, 1862, in Warrenton, N. C., at the house of witness, where Vaughan stayed all night, on his way to Mecklenburg. Witness asked him if that policy had been kept up. He said it had been kept up, and was all right, and the money would be forthcoming as soon as communication was opened; that Vaughan said nothing about receipts, or of having sent the money to New York; that Hendren and Vaughan were both natives of Virginia, and neither of them left it during the war; that witness married a sister of Mr. Vaughan and of Mr'. Hendren. It was proved by the defendant that by the acts of incorporation of the New York Life-Insurance Co., that the defendant was duly incorporated in the year 1849, under the laws of the State

of New York, with its home office in New York City, and that *that* the said company is a mutual company; and it was proved by the statement of Col. V. D. Groner, introduced by consent of the parties to this suit, that Wm. T. Hendren was in the office of said Groner for some months while the latter was on duty as assistant adjutant-general, in the adjutant-general's office of the Confederate States, in Richmond, in the spring and summer of 1862; that the said Hendren's duties were purely clerical, and that the said Groner's duty, while in the adjutant-general's office, were also clerical; that the said Hendren was never a commissioned officer, or in the military service of the Confederate States, and was not subject to military orders, and could have resigned his situation with Groner, col., at any time. The defendant proved by deposition Theodore M. Banta that he was cashier of the New York Life-Insurance Company; that he had been in the employ of the company over twelve years; that in 1861 and 1862 he was mathematician and examiner of agents' accounts of said company; that as such it *it* was his duty to examine and adjust the agents' accounts during those years, and to make the entries of premiums paid from agencies, and that he did make the said entries in the "agency book;" that R. H. Vaughan was the agent of the company at Hampton; that the witness had examined the statements and papers of the company as transmitted by said Vaughan, and the books of the company for premiums paid on Mrs. Hendren's policy since February 25th, 1861; and that it appeared from them that the last premium paid on said policy was received April 13th, 1861, and was the premium due February 25th, 1861; that it was the custom of the company to forward renewal ceceipts for premiums becoming due at various agencies, which receipts were signed by the president or actuary, and required to be countersigned by the agent, to be valid; that 66 the agent was charged with the various receipts, and monthly accounts were required from the agent of all premiums paid at his agency. Renewal receipts for premiums unpaid being returned for cancellation, these charges were made in the agency book; that this course was pursued with Vaughan; that the witness had examined the agency book recently, and there are no entries there of renewal-receipts sent Vaughan for premiums due on this policy at any date subsequent to Feb'y 25th, 1861; that he made the entries in the agency book; that it was his duty to do so; that agents were not authorized by the company to give any receipts except renewal-receipts, signed by the president or actuary; that no premiums on the said policy were paid directly to the home office, in the city of New York, from the insured, since the 1st of January, 1861, and but one was paid through R. H. Vaughan, and that was received on the 15th April, 1861, being the premium due February 25th, 1861.

And the court certifies that the foregoing were all the facts proved.

Signed and sealed at Norfolk this 28th day of February, 1871.

W. H. BURROUGHS. [SEAL.]

The defendant stating that it thinks itself aggrieved by the judgment rendered in this cause at the present term, and that it desires to appeal therefrom to the court of appeals of this State, and intends to apply for such appeal, the court doth fix sixty days as the time within which the said New York Life-Insurance Company may apply for such appeal, and doth order that execution of the said judgment be suspended for that time, provided the said defendant, or some responsible person, shall enter into bond before the clerk of this court, with sufficient security, in the penalty of two hundred dollars, with a condition according to law.

67, 68

E.

Please observe instructions on next page.

CR. *Mr. F. F. Ferguson, agent at Norfolk, Va., in account with New York Life-Insurance Company.* DR.

No. of policy.	Date when paid at agency.	Name.	Annual, semi-annual, or quarterly.	Cash.	Note.	Interest on note.	Total amount of payment.	Charges, &c.		
	1861.									
2757	Feb'y 3	Simon Stone	49, quar				41 00	Paid	41 00	
4233	11	G. Mayer	47, "				6 60	Ret'd		
4604	12	J. A. Higgins	46, "				31 00	Paid	31 00	
9054	28	Jno. White	34, "				18 60	"	18 60	
9053	28	Thos. E. Sale	34, "				19 20	"	19 50	
9597	23	E. H. Delk	16, semi				70 00	Ret'd		
9951	13	Eli Cutherell	28, quar				6 80	Paid	6 89	
10259	16	H'y Burgess	19, "				14 40	"	14 40	
12240	11	Eli Cutherell	13, "				8 00	"	8 00	
11698	11	Jno. S. Taylor	16, "				37 50	"	37 50	
11381	7	R. Boggett	18, "				15 90	"	15 90	
10997	16	Jno. F. Meyer	20,				8 40	"	8 40	
11001	15	R. F. G. Gwinn	20,				10 00			
11002	15	Wm. Sherwood	20,				25 60			
11015	19	Alex. F. Santos	20,				28 00	Rt'd		
11030	23	H. l. Maign	20,				15 50	Paid	15 50	
11002	23	S. S. Barrett	20,				9 30	"	9 30	
11041	26	J. W. Burrow	20,				13 80	"	13 80	
2089	March 11	F. F. Ferguson	51,				9 60	"	9 60	
2100	16	J. Vickory	51,				6 50	Rt'd		249 30
2260	26	Geo. L. Crow	50,				5 40	"		
2271	28	J. M. Smith	54,			Paid at office.		Notice of death Nov. 18, '61. Loss pd., Jan. 30, '62		
4048	28	W. W. McKinney	48,				7 50	Paid	7 50	
4061	15	Jno. Gormly	48,				23 36	Rt'd		
5114	4	Geo. Clark	45,				17 70	Paid	17 70	
							449 66			
5269		R. B. Tunstall	45, quar					Paid at office Oct. 7, '62		
7651		Jas. A. Saunders	39,				6 50	Rt'd		
8181		E. Dellany	37,				12 80	Paid	12 80	
8182		Geo. Grover	10, an'l				44 90	"	44 90	
8288		D. D. Hutchings	37, quar				6 20	Not paid; rec't mislaid		
10870		J. O. Mirian	11, semi				39 40	Rt'd		
10881		Wm. Johnson, jr	21, quar				15 50	"		
11317		Jno. D. Cowper	19,				28 40	"		
11550		Jno. A. Myer	5, an'l				224 00	Rec'd note; not yet paid; remaining in bank		
11570		J. A. Hendren	17, quar				13 00	Not paid; rec't mislaid		
11999		Do.	15,				6 50	" "		
12471		H. Fitzgerald	12,				20 60	Paid	20 60	

12815			J. H. Hendren	10,				6 60	Not paid; rec't mislaid		
13071			J. M. Kilby	3, an'l				65 10	" "		
13917			C. V. Moore	5, quar.				13 25	" "		
2370			Jno. C. Rogers	50,				5 00	Ret'd		
5555			Reuben Jones	45,				25 50	Pd. by scrip; deposited		
5554			J. F. Beatty	12, an'l				61 20	R't'd		
7641			Job Jakeman	39,				6 35	"		
8958			H. B. Constable	19, semi				15 60	"	103 50	
9381			E. D. Seal	17,				20 80	"		
9382			J. E. Shields	9, an'l				29 70	"		
9421			Wm. Johnson	33, quar				14 00	"		
								1,120 86			
9661	April	28	T. F. Owens	Quar				19 56	"		
9662		29	Wm. McPannel	"				18 60	"		
10389		19	W. B. Seal	"				23 50	"		
11338		4	S. S. Dawes	"				22 50	"		
11636		18	G. F. Stone	5, an'l	63 30	42 20	10 13	115 63	"		
11639		20	W. Denby, jr	"	91 30	61 00	14 64	167 14	"		
11643		22	W. B. Young	"	61 20	40 80	9 79	111 79	"		
11649		23	R. W. Santos	"	63 30	42 20	10 13	115 63	"		
11901		27	C. B. Oliver	Quar				21 60	Paid and r't'd to him; r'e't given up, and not ret'd		
12666		14	Wm. H. Face	"				16 00	Ret'd	44 25	
3846	May	25	E. R. Gale	13, an'l				44 25	Paid	34 00	
7057		26	Jno. Ney	11,				34 00	"		
9951		13	E. Cutherell	Quar				6 80	Ret'd		
10998		15	Wm. C. Diggs	6, an'l	47 75	30 00	9 00	86 75	"		
10999		15	A. J. Denby	6, "	65 10	43 00	13 02	121 52	"		
11000		15	L. L. Brickhouse	6, "	67 20	44 80	12 40	124 40	"		
11006		17	C. A. Santos	6, "	70 50	45 00	13 50	129 00	"		
11007		17	J. R. Todd	6, "				91 00	"		
11008		17	A. Wrenn	6, "	68 00	44 00	13 20	125 20	"		
11009		17	J. H. Boll	6, "				58 00	"		
11016		19	C. H. Kennedy	6, "				186 50	"		
11026		22	J. Holmes	6, "	91 50	61 00	18 30	170 80	"		
11030		23	H. J. Mayne	Quar				15 50	"		
11022		23	T. L. Barrett	"				9 30	"		
								2,973 53			
11033	May	24	C. Burruss	6, an'l	174 00	116 00	34 80	324 80	Ret'd		
35		24	E. Clapp	"	34 00	22 00	6 60	62 60	"		
37		24	Jesse Jones	"	120 30		2 88	123 18	"		
38		24	E. C. Deming	"				52 75			
41		26	J. W. Burrow	Quar				13 80	"		
42		26	J. W. Wilkinson	6, an'l	46 10	31 00		86 40	"		

No. of policy.	Date when paid at agency.	Name.	Annual, semi-annual, or quarterly.	Cash.	[Note.	Interest on note.	Total amount of payment.	Charges, &c.		
43	26	D. B. Marcus	6 an'l	36 75	24 00	7 20	67 95	Cash paid, $43.95	43 95	
								Note rec'd Aug. 28, '62, $24		
44	26	W. P. Griffith	paid July, 1862			recd	3 45	Not rec'd; ret'd		
							54 05	Paid	54 05	
46	26	E. J. Griffith	6 an'l	42 25	28 00	8 40	78 65	Ret'd		
47	26	T. Botimore	"				66 00	"		
48	26	M. Carroll	"				34 00	"		
58	28	C. Schwarzkopt	"				82 50	Paid	82 50	
62	29	Wm. B. Rogers	"	82 50	55 00	16 50	154 00	Ret'd		
61	30	L. Berkley	"				108 50	"		
63	31	J. J. Jones	"	52 80		3 78	56 58	"		
64	31	D. P. Chuney	"				52 80	"	258 75	
65	31	J. E. Barry	"				152 50	Note rec'd by F. F. F		
76	31	E. A. Dodd	"				39 60	Ret'd		
79	27	A. Sinclair	"				186 50	"		
11681	4	C. W. Bowney	5 an'l	36 72	24 48	5 88	67 08	"		
83	4	T. Peters	"				105 30	"		
91	8	Wm. B. Sinclair	"	93 30	62 20	14 92	170 42	"		
92	8	J. G. Smith	"	91 50	61 00	14 64	167 14	"		
94	2	G. W. Dey	"	56 40	37 60	9 02	103 02	"		
							5,329 60			
1698	May 11	J. P. Taylor	Quar				37 50	Paid	37 50	
706	15	A. L. Sebery	5 an'l	67 20	44 80	10 76	122 76	Ret'd		
719	18	J. V. Halt	"	34 65	23 10	5 36	63 11	"		
24	21	B. T. Bocker	"				77 10	"		
33	23	D. Dey	"	44 76	29 84	7 16	81 76	"		
35	25	G. B. Davids	"				52 80	C. 11.60 rt'd		
43	26	A. B. McClean	"	105 00	70 00	16 80	191 80	Int. rec'd, 5.20. Paid int.; rec't rt'd		
								Note rec'd Aug. 28, '62, $70		
							121.80		116 60	
59	28	G. Barney	"	57 00	38 00	9 12	104 12	R'td		
63	30	J. C. Whitehurst	"	50 58	33 72	8 08	92 32	"		
12741	17	L. Parsons	Semi				8 15	"		
11190	Jan'y 10	R. A. Worrell	6 an'l	111 90	74 60	22 28	208 78	Note rec'd Aug. 28, '62, $74.60	134 18	288 28
13147	May 23	J. B. Fisher					42 20			
							6,412 06			
		3 notes rec'd am'g to		168 60				Rec'd check for $900, being 17c. over		

73 *Memorandum (F.)*

The agent, by reference to his appointment, will find in the "Instructions" thereto attached the following points to be observed in rendering this account:

1. Returns are to be forwarded on or before the last week-day of each month.
2. Vouchers for all expenditures to accompany the account in which the charge is made.
3. Remittances to be made by a sight draft or bank certificate of deposit, payable to the order of the company.
4. Policy fee to be credited to the company.
5. For the collection of premiums upon risks originally obtained by other parties the commission allowed is 2½ per cent.
6. The premium cannot be received after it becomes due, unless the party is in good health.
7. Policies or renewal receipts remaining unpaid to be returned with the monthly account, unless there are special reasons for the detention, which reasons are to be noted on the return.
8. Agents crediting premiums not actually received by them do so at their own personal risk, and for which the company will not, under any circumstances, be responsible to remit the same upon their non-receipt by the agent.

STATE OF VIRGINIA,
City of Norfolk, to wit:

I, Thomas W. Peirce, clerk of the corporation court for the city of Norfolk, do hereby certify that the foregoing is a true transcript of
74 the record and proceedings in a certain action of assumpsit, lately depending in said corporation court, between Henrietta Hendren, plaintiff, and the New York Life-Insurance Company, defendant, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof I have hereunto set my hand this 18th day of April, A. D. 1871.

THOS. W. PEIRCE, *Clerk.*

Cost of this record, $35.

75 And at another day, to wit, at a supreme court of appeals, held at the State court-house, in the city of Richmond, on Thursday, the 12 day of February, 1874.

THE NEW YORK LIFE INSURANCE COMPANY, plaintiff,
against
HENRIETTA HENDREN, DEFENDANT.

Upon a writ of error and supersedeas to a judgment rendered by the corporation court of the city of Norfolk.

This cause was this day partly heard, upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued till to-morrow.

And at another day, to wit, at a supreme court of appeals, held on Friday, the 13 day of February, 1874, this cause was this day further

heard, upon the transcript of the record of the judgment aforesaid and the arguments of counsel, and continued till to-morrow.

And at another day, to wit, at a supreme court of appeals, held on Saturday, the 14 day of February, 1874, this cause was this day fully heard, upon the transcript of the record of the judgment aforesaid and the arguments of counsel; but because the court here was not
76 advised of its judgment to be given in the premises, time was taken to consider thereof.

And now at this day, to wit, at a supreme court of appeals, held at the State court-house, in the city of Richmond, on the same day and year first herein mentioned, to wit, Tuesday, April 7, 1874:

THE NEW YORK LIFE INSURANCE COMPANY, plaintiff,
against
HENRIETTA HENDREN, DEFENDANT.

Upon a writ of error and supersedeas to a judgment rendered by the corporation court of the city of Norfolk, on the 23 day of February, 1871.

This day came again the parties, by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. Therefore it is considered that the same be affirmed, and that the defendant in error recover against the plaintiff in error damages according to law, and her costs by her about her defense in this behalf expended.

Which is ordered to be certified to the said corporation court
77 of the city of Norfolk.

The reasons, in writing, for the opinion of the court, as stated in the preceding order, are in the words and figures following, to wit:

Opinion of supreme court of appeals.

NEW YORK LIFE INS. CO.
v.
HENDREN.

It is now settled by the decisions of this court in Manhattan Life-Ins. Co. v. Warwick, (20 Gratt.,) and in the recent case of Mutual Benefit L. Ins. Co., vs. Atwood's admx., (not yet reported,) and also by the decision of the special court of appeals in New York Life-Ins. Co. v. White, (The Ins. L. Journal for Decr., 1873, p. 917,) that contracts of life-insurance entered into before the late war are not abrogated, but only suspended by the war. And with these Virginia decisions, the highest judicial tribunals of the States of Kentucky, New York, New Jersey, & Mississippi, and the Federal circuit courts for the southern district of New York, J. Bla'ckford, and for the eastern district of Virginia, J. Bond, are in accord.

78 The Kentucky case was the first in order of time, but had not been reported when the Warwick Virginia case was decided. We had not then heard of that decision, & had not the benefit of the able & lucid opinion of Judge Robertson, the distinguished chief-justice of

the court of appeals of Kentucky; though our reasonings brought us to the same conclusions. And it is a source of sincere gratification that decisions so just & so plainly enforcing the rights of destitute widows & orphans have received the sanction, commendation, & approval of so many eminent courts distinguished for their learning & wisdom.

In this case, which is an action of assumpsit, the verdict of the jury is for $5,000, the whole amount of the insurance. There was a motion for a new trial, which was overruled by the court, & judgment rendered for the amount of the verdict, to which the plaintiff in error excepted, & the evidence is certified as the facts proved in the cause.

The only open question under the previous rulings of this court, as before recited, is as to the amount of the verdict. It is clearly shown that the assured was willing & anxious & was prepared to pay the premiums as they fell due; and that they would have been paid if
79 the company had had an agent here authorized to receive them. Vaughan, who was their agent before the war, & to whom the premiums had been paid up to the 25th of May, 1861, upon printed receipts signed by the president or actuary, and countersigned by the local agent, in the mode prescribed by direction attached to the policy, was not furnished with such receipts for the premium which fell due on the 25th of May, 1861, or for any of the subsequent quarterly payments which fell due in the life-time of the insured, which, in the absence of any waiver on the part of the co., or of any express instruction to receive payment, must be regarded as evidencing a withdrawal of authority from the agent to receive payment, as was held in White's case, above cited. In Warwick's case it was held that the payment made to the local agent & accepted by him was valid & binding upon the company, altho' they had not furnished the printed receipt. But in that case, express instructions to the agent to receive payment in the kind of funds in which it was paid were proved; and upon that ground & other circumstances in that case, the company was held to have waived the requirement that the payment should be evidenced
80 by a printed receipt signed by the president or secretary. And in that case, the evidence was clear & unquestionable that payment was made to the agent in the kind of funds or its equivalent which he was instructed to receive, and that he was prepared to make the remittance to the company by draft on New York, as he had been instructed to do, of which the company had notice. There is no such evidence in this case. But the presumption may fairly be drawn from the evidence that if the company had furnished their agent with the receipts signed by the president or actuary, the premiums would have been paid. If we discard all the evidence tending to prove the agency of Vaughan after the commencement of the war, and his declarations & admissions, the evidence in the record does not show that the five quarterly premiums which fell due on the 25th of May, 1861, & subsequently in the life-time of the insured, amounting in all to $150, were paid, unless the company had in its own possession a sufficient amount due the assured in dividends to satisfy them. Whether the evidence is sufficient to establish such a claim on part of the assured, was properly a question for the jury. And whether the evidence warranted the
81 jury to set off the *the* dividends against the premiums or not, it does not appear that they did or did not. They found a verdict for $5,000, with interest from the 2nd day of February, 1870.

The court is of opinion that if the assured was entitled to the insurance-money she was entitled to interest upon it from an earlier period than that which is allowed by the verdict, and that the interest to

which she was entitled, & not allowed by the verdict, will more than compensate for the one hundred & fifty dollars of premiums. If we assume, then, that no payments were made through Vaughan, pendente bello, & that nothing was due the assured on account of dividends, (an assumption as to the dividends not warranted by the evidence,) it does not appear that the verdict is excessive. It should not, therefore, be disturbed on that ground.

The court is also of opinion that the court below did not err in giving the plaintiff leave to amend her declaration and in overruling the demurrer, or in admitting the policy to be given in evidence to the

82 jury, as set out in the 1st bill of exceptions. It is also of opinion that the declarations & admissions of R. H. Vaughan, as testified to by Mrs. Hendren, tending to prove his agency or the payment of premiums during the war, as set out in the 2nd bill of exceptions, are not necessary to support the verdict or the plaintiff's right of action; the evidence in the record, exclusive of the declarations & admissions of Vaughan, showing that the verdict is not excessive, & the payment of premiums flagrante bello not being essential to the plaintiff's right of action. The company was bound to keep an agent here continuously to receive premiums & to pay policies. It would be unreasonable & unjust to hold the insured to a forfeiture of his contract & of the money he had paid on account of premiums because he did not pay premiums which he could not pay because of the failure of the company to have an agent here, as bound by its contract, authorized to receive them. If the company was excused for the non-compliance with its contract in this particular, surely the insured would be excused for the non-payment, & could not be held to a forfeiture therefor.

83 The court is further of opinion that there is no error in the instruction given on motion of the plaintiff, set out in the defendant's 3d bill of exceptions, and that if the principles enunciated in instructions No. 1, 2, 3, 4, 6, 8, 9, 11, 14, 15, 16, 18, 19, 20, 21, moved by defendant, are true in the abstract, upon which we do not intimate an opinion, it was immaterial to the plaintiff's right of action whether the agency of Vaughan was continued during the war or not; and the acts, declarations, & admissions of said Vaughan were not material in maintaining the issues on part of the plaintiff, & the verdict of the jury is well supported by the record if they are excluded; and, therefore, the refusal to give said instructions, even such as might be right in the abstract, has not been to the prejudice of the plaintiff in error. Nor is there error in the qualification given by the court to the 7th instruction. But the instruction, with or without the qualification, was not material upon the question of the plaintiff's right of action, nor upon the issues involved. And if it had been given without the qualification it could not have affected the plaintiff's right of action or recovery, & is, therefore, an abstraction. Instruction No. 5, so

84 far as it relates to the agency of Vaughan, falls within the principle of the class of instructions before noticed. And so far as it denies to the plaintiff her right to recover because of her removal from Portsmouth to Norfolk, & thence to Richmond, is not law, & was properly overruled. The policy, by the contract, was not made to depend upon the insured remaining at Norfolk or Portsmouth, or his not removing to any other place in Virginia. And there is neither reason, nor law, nor justice in holding that the insurer should hold on to the money he had received from the insured, & be absolved from his obligation of insurance for the term of his life, because when the war broke

out the insured did not separate himself from his kindred & friends & throw himself into the arms of their enemies. There is no such stipulation or condition in the contract. It does provide that he shall not pass, without the consent of the company, &c., beyond the settled limits of the United States that lie east of the Rocky Mountains, except into the settled limits of the British provinces, &c., or visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Virginia & Kentucky, between
85 the 1st of July and the 1st of November, or enter into any military or naval service whatever, the militia not in actual service excepted. He was at liberty, therefore, under the contract, to go anywhere he chose except within the lines prohibited. And he was inhibited from engaging in active military or naval service without the consent of the company. These were the only restrictions touching the point in question which are imposed on him by the contract; and to hold that his removal from place to place, not within the inhibited lines, or that he did not separate himself from his kindred & friends & throw himself into the arms of their enemies, subjected him to a forfeiture of his contract, not to the Government, but to the defendant, would be for the court to insert a clause in the contract of the parties which they did not put there—to make a contract for them which they did not make for themselves. We are of opinion, therefore, that the court did not err in refusing to give this instruction.

The 10th & 17th instructions are identical, and announce an abstract principle which, we think, under the terms of the act of assembly,
86 is not law, to wit, that "the defendant could not do by an agent what it could not do by itself." The defendant in fact being a corporation could do nothing except by agents; but if it is meant that this company could not do by its agent in Virginia what it could not do through its New York agent, it is not true. The prohibition of the act of assembly, which was in force at the date of this policy, & ever since, is that no person shall act otherwise than is provided in the 2nd section of the act, as agent for any such company, to make or renew directly or indirectly any contract of insurance within this State & with any person resident therein, without complying with the requisitions of this act, or in any way contrary to the true intent & meaning thereof, under the penalty of 500 dollars. (Code of 1860, p. 241, §32.) The section referred to requires that the company shall appoint some citizen of the Commonwealth resident therein its attorney or agent, (§24;) in the original act, §2. Thus it appears that the company can only contract through its resident agent in this State, to whom, by the contract & the stat-
87 ute, premiums are to be paid. (For construction of statute, see Warwick, &c., Manhattan Ins. Co., 20 Gratt., *supra.*) When this company undertook to do business in this State, it was upon the terms of this statute. And those recited show that the company could do by its agent in Virginia what it could not do by its officers or agents of New York. The 12th instruction was given, &, whether right or wrong, cannot be complained of by the co., because given at its instance.

The 13th is contrary to the decisions of this court before cited, & we think was properly rejected. The 22nd & 23d, so far as they affect the question of Vaughan's agency flagrante bello, are not material, it not being necessary to establish such agency to entitle the plaintiff to recover. And so far as it asserts that the acting of the insured as a clerk in the office of the adjutant-general dissolved the contract, not as an abstract proposition, but in the mode & under the circumstances proved in the cause, it is not true. For it is proved that he was subject to no military

order & held no commission or position connected with the
88 military service. Upon the whole the court is of opinion that the judgment be affirmed.

And at another day, to wit, at a supreme court of appeals held on Tuesday, the 14 day of April, 1874, came again the parties, by their counsel, and the court having maturely considered the petition filed by the plaintiff in error for a rehearing of the judgment rendered herein on the 7th instant, and no one of the judges who concurred in that judgment being dissatisfied with it, or desiring such rehearing, it was ordered that said petition be denied.

Which said petition is in the words and figures following, to wit:

Petition for rehearing.

In the supreme court of appeals of Virginia.

THE NEW YORK LIFE-INS. CO. *vs.* HENRIETTA HENDREN. } In error.

To the hon. judges of the supreme court of appeals of Virginia:

The petition of the New York Life-Ins Co. respectfully represents:

89 Since the argument of the above-entitled cause before this court, the several questions upon the effect of war upon a contract of life-insurance involved in it have been presented to the Supreme Court of the United States in two cases: Tate vs. The New York Life-Ins. Co., and The Mutual Benefit Ins. Co. vs. Hamilton, &c., appealed from the decisions of Judges Emmons and Blatchford respectively. The decision in each of these cases by a divided court has affirmed the judgment of the lower court, so that the Supreme Court at present presents itself as contradicting itself, and it is therefore pretty well ascertained that a re-argument of the whole matter will be had before the Supreme Court of the United States, and that immediately.

The questions involved are of a national character and very fit to be determined by the Supreme Court of the United States, so that an uniform rule may be established and followed for all the States, for we understand it to be the custom and settled practice of the State courts, after an authoritative decision by the Supreme Court of the United States, to abide such decision in all those cases which would have
90 been cognizable in the United States courts under the Constitution and laws of the United States. (Mr. Hinkley refers to 34 Maryland Rep., 174.)

For the reasons stated, the plaintiff in error here moves for a re-argument of this case, upon filing in the clerk's office duly-certified copies of the opinion of the Supreme Court of the United States in the above cases, and that this court will stay execution or make such other order as may be necessary until the determination of this motion.

E. O. HINKLEY AND WM. W. OLD,
For Plaintiff in Error.

APRIL 11, 1874.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true transcript of the record of the suit of the New York Life-Insurance Company against Henrietta Hendren, recently pending in the said court.

91 In testimony whereof I hereto subscribe my name and annex the seal of the said court, at Richmond, this 7 day of May, 1874.

[SEAL.] GEO. L. CHRISTIAN.

92 And at another day, to wit, on the 8th day of June, 1874, the said New York Life-Insurance Company filed in the clerk's office of the supreme court of appeals of Virginia, at Richmond, the writ of error awarded on its petition in this cause by the Chief-Justice of the Supreme Court of the United States, with the said petition upon which it was allowed, and the citation thereon, the originals of which are annexed to this record. And the said New York Life-Insurance Company filed in said clerk's office a copy of said writ of error and citation, and also filed a bond, the original of which now remains in this office, and a copy of which is in these words and figures, to wit:

93 Know all men by these presents that the New York Life-Insurance Company (a corporation duly incorporated under the laws of the State of New York) and William Barton, of the city & State of New York, and Horace B. Claflin, of the city of Brooklyn, & State of New York, are held and firmly bound unto Henrietta Hendren in the full and just sum of ten thousand dollars, to be paid to the said Henrietta Hendren or to her certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly, by these presents, sealed with our seals, and dated this twenty-fifth day of May, in the year eighteen hundred and seventy-four.

Whereas, lately, at a supreme court of appeals of Virginia held
94 at the State court-house, in the city of Richmond, in a cause depending in said court upon a writ of error and supersedeas to a judgment rendered by the corporation court of the city of Norfolk, between the above-bound New York Life-Insurance Company, as plaintiff in error, and the said Henrietta Hendren, as defendant in error, judgment was rendered against the said New York Life Insurance Company; and the said New York Life-Insurance Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment aforesaid, and a citation directed to said Henrietta Hendren, admonishing her to be and appear at a Supreme Court of the United States to be holden on the second Monday of October, eighteen hundred and seventy-four:

95 Now, the condition of the above obligation is such that if the said New York Life-Insurance Company shall prosecute said writ of error with effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to be and remain in full force and virtue.

MORRIS FRANKLIN, *President.* [SEAL.]
WM. BARTON. [L. S.]
H. B. CLAFLIN. [L. S.]

Signed, sealed, and delivered in the presence of
FRED. G. SCRIBER.

STATE OF NEW YORK,
City and County of New York, sct:

I hereby certify that on this twenty-fifth day of May, in the year eighteen hundred and seventy-four, before me, a notary public, duly appointed, commissioned, and qualified, in and for the said city of New York, personally appeared William Barton and Horace B. Claflin,

known to me to be the individuals described in the foregoing bond and who executed the same, and severally acknowledged the same to be their respective act, and they being each duly sworn, each for himself saith that he is a resident at the place designated in the body of the foregoing instrument as such residence, and that they are each severally worth the sum of fifty thousand dollars over and above their just debts and liabilities.

[SEAL.] G. A. CROCKER, (152)
Notary Public, New York.

STATE OF NEW YORK,
City and County of New York, ss :

I, William Walsh, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that G. A. Crocker,
97 whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was at the time of taking such proof or acknowledgment a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 25th day of May, 1874.

[SEAL.] WM. WALSH, *Clerk.*

98 Circuit court of the United States for the southern district of New York, second circuit, sct.

I, Kenneth G. White, clerk of the United States circuit court for the southern district of New York, second circuit, do hereby certify that I believe and know the obligors in the preceding bond to be good and sufficient, and that the said bond would be accepted in this court as a good and valid security for the sum named in said bond.

In witness whereof I have hereunto subscribed my name and affixed the seal of office of said court, at the city of New York, this twenty-fifth day of May, 1874.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the U. S. for the Southern Dist. of New York.

Wherefore, I, George L. Christian, clerk of the supreme court
99 of appeals of the State of Virginia, at Richmond, in answer to the foregoing writ of error return the record and proceedings aforesaid, with all things concerning the same, to the said Supreme Court of the United States, and I hereby certify that the same is a full, true, and perfect transcript thereof.

In testimony whereof I hereunto subscribe my name and annex the seal of the said court, at Richmond, on this 15th day of July, A.D. 1874.

[SEAL.] GEO. L. CHRISTIAN.

(Indorsement on cover:) No. 458. The New York Life-Insurance Company, plaintiff in error, vs. Henrietta Hendren, Virginia sup. court of appeals. Filed 31st July, 1874.

Supreme Court of the United States,

No. 458.--October Term, 1874.

—o—

THE NEW YORK LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

HENRIETTA HENDREN.

—o—

In Error to the

Supreme Court of Appeals of the State of Virginia.

—o—

Brief of Defendant in Error, on motion to dismiss for want of Jurisdiction.

Supreme Court of the United States,

No. 458.--October Term, 1874.

THE NEW YORK LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

HENRIETTA HENDREN.

IN ERROR TO THE

Supreme Court of Appeals of the State of Virginia.

Brief of Defendant in Error, on motion to dismiss for want of Jurisdiction.

STATEMENT OF CASE.

On the 25th of August, 1856, the New York Life Insurance Company, plaintiff in error, insured the life of William T. Hendren of Norfolk, Virginia, in the sum of $5000, for the benefit of his wife, Henrietta Hendren, the defendant in error. The insurance was negotiated, and the policy issued, through the agent of the Company resident at Norfolk. The quarterly premiums, it is admitted, were duly paid in advance up to and including the one due on February 25th, 1861, and it is claimed by defendant in error, that, after the beginning of the war, they continued to be regularly paid to the agent of the Company in Virginia, until the death of William T. Hendren, which occurred August 15th, 1862.

The defendant in error brought suit on the policy at the April rules of the Court of the Corporation of the city of Norfolk, in 1870. The 1st, 2d, 3d, 4th, 5th and 8th pleas put in issue the execution of the policy, due proof and notice of death, the payment of the premiums, and compliance with the terms of the policy. The 6th and 7th pleas alleged that after the beginning of the war, the said William T. Hendren and his wife continued to reside in the State of Virginia, and "did connect themselves with the Government of the so-called Confederate States of America." To the 6th and 7th pleas, the defendant in error demurred, and the demurrer was sustained. Judgment on trial was in favor of defendant in error, and on appeal taken by the Company to the Supreme Court of Appeals of Virginia, the same was affirmed.

Motion to Dismiss.

The defendant in error now moves to dismiss the writ, for want of jurisdiction, because no federal question is presented by the record, or was involved in the case.

(*a.*) If any decision of a federal question were made in the case, the record should set forth the question with at least reasonable certainty.

Messenger vs. Mason, 10 Wall, 507.
Parmlee vs. Lawrence, 11 Wall, 36.

It shows none.

(*b.*) No such question was raised in the State Court, nor does it appear from the record that the decision of any such question was necessary to the judgment rendered. Apart from the usual defences in *assumpsit*, there was no question in the case, except that of the effect of war upon a contract of life insurance. This was not a federal question, but a question of public law.

The Act of Congress of July 29th, 1861, forbidding commercial intercourse to the extent therein expressed, has no bearing on the case. Not only commercial, but other, intercourse was already interdicted at that time by the existence of war. The beginning of the war, as to the State of Virginia,

was April 27th, 1861. (The Protector, 12 Wall, 700.) The effect of this Act of Congress was to modify and regulate the interdiction of commercial intercourse already imposed by public law.

Allen vs. Russell, 3 A. L. R., (N. S.,) 362.
Bilgery vs. Branch, 8 A. L. R., (N. S.,) 334.
Blakeley vs. United States, 2 N. & H., 323.

The Act of 1861 is referred to by the defendant in error, because she has reason to believe that the plaintiff in error will in some way assert jurisdiction in relation to it. The record however, presents no question touching it, nor was the Act drawn in question in the State Court; much less was there any decision against its validity.

ALBERT RITCHIE,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 458--October Term, 1874.

THE NEW YORK LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

HENRIETTA HENDREN.

In Error to the Supreme Court of Appeals of the State of Virginia.

Brief in Reply for Plaintiff in Error on the motion to dismiss for want of jurisdiction.

STATEMENT OF CASE.

This suit is on a Policy of Insurance made by Plaintiff in Error, which is a New York corporation, on the life of William T. Hendren, in favor of his wife, both of whom were citizens of Virginia, dated in 1856. They continued to reside in Virginia until his death, on the 15th of August, 1862.

The Defendant in Error undertook to prove payment to an Agent in Virginia, during the war.

The several statutes of the United States, in relation to intercourse between its citizens and the belligerents, were both pleaded

and relied upon in several instructions prayed, all of which were refused, as appears by the Record as follows:

Plea No. 6.

And for a further plea in this behalf, the said Defendants by their said attorneys, say: that at the time of the making of the said promise by the said Defendants by the said Plaintiff thereof above alleged in her said declaration, the said Defendants were, and have continued since to be, a corporation duly incorporated under the laws of the State of New York, and as such was, and continue to be, a citizen of and at peace with the Government of the United States. And that the said William T. Hendren, his wife, the Plaintiff in this action, after the making of the said promise by the said Defendants, by the said Plaintiff so alleged, were to wit: from the 16th day of August, 1861, to the time of the death of the said William T. Hendren, and continued to be residents of the State of Virginia, and did connect themselves with the Government of the so-called Confederate States of America, and voluntarily reside within its military lines, and did continue to reside within, and be connected with the said Government during the said time; which said Government and States were, and continued to be in open hostility to, and engaged in war with the Government of the United States, from the 16th day of August, 1861, to the time of and after the death of the said William T. Hendren; and this the Defendants are ready to verify.

There was a demurrer by Plaintiff to above plea, which was allowed.

Several instructions were asked and refused—involving the construction of Acts of Congress, of which the following are some:

Instruction No 1.

That in contemplation of law, war existed between the United States and the Confederate States, from 19th August, 1861, and that war dissolved the agency of Vaughan for Defendant, and therefore, the Plaintiff cannot recover, unless the jury find that the Defendant did actually receive all the premiums on the policy of insurance given in evidence, which became due prior to the

death of Mr. Hendren, and any agreement which Mr. Vaughan made after the commencement of the war to pay the premiums, is no evidence of such payment, unless the jury further find that said Vaughan did actually transmit the premiums to the Defendant, or in some manner account to them for the same.

Instruction No. 4.

That if the jury find that from the commencement of hostilities about April, 1861, until his death in Feb., 1864, R. H. Vaughan who was agent of the Defendant was in actual service of the Confederate army and a combatant against the United States, then his agency terminated at the time of his entering that service and none of his acts thereafter bind the Defendants, unless known to them, and assented to by them, of which there is no evidence.

Instruction No. 10.

That during the war, the Defendant itself could have no kind of business communication or intercourse with the Plaintiff in the Confederates lines, unless specially licensed thereto by the United States Government, and that the Defendant could not do by an agent what it could not do by itself.

Instruction No. 11.

If the jury shall believe from the evidence that from and after the 19th day of April, 1861, communication ceased between New York, and Norfolk, and Hampton in Virginia, in consequence of the war; then the New York Life Insurance Company were excused from sending renewal receipts to their agents in Virginia until communication was re-opened, even though the jury may find it had been the custom or was the duty of the said Company to send such renewal receipts before the commencement of said war.

Instruction No. 16.

That, in legal contemplation, a war existed between the United States and the Confederate States from the 16th August, 1861, until after the year 1864; that a corporation, incorporated by the State of New York, must, for the purpose of this suit, be considered a citizen of the United States, and a citizen and resi-

dent of the State of Virginia during the late war must be considered a citizen of the Confederate States; that no commercial intercourse was lawful between any of the citizens of the United States, and any of the citizens of the Confederate States during the war between them, without license of the Governments of those States respectively, and there being no evidence of any such license in this case, the jury can not presume that Vaughan did transmit the premiums on policy of insurance given in evidence, or in any manner account for them to the Defendant, without positive evidence of that fact.

Instruction No. 17.

That during the war, the Defendant itself could have no kind of business, communication or intercourse with the Plaintiff in the Confederate lines, unless licensed by the U. S. Government, and that the Defendant could not do by an agent what it could not do by itself.

Beside these there were many other instructions refused, which may be seen in the record, and will shew the nature of the case.

In the further examination of the case it will be seen that the Court of Appeals affirmed all the rulings of the Court below; and moreover sustained the validity of their own Statute of Virginia as binding the Plaintiff in Error, to keep an agent in Virginia during the war, and made payment to him good.

See the opinion at the end of the record, and the case of Manhattan Life Insurance Company *vs.* Warwick, 20 Grattan, Va. Rep., 614.

The conclusions in which case adopted and applied to this, to the effect that the Virginia Statute, *required* the Company to keep an agent in Virginia even during war.

The Plaintiff in Error refers particularly to the grounds for the allowance of the writ set forth in his petition for the writ, and in *tenth* clause thereof as contained in the record, and the authorities there cited.

In Montgomery *vs.* The United States, 15 Wallace, 400, held: "Every kind of trading or commercial dealing, or intercourse, whether by transmission of money or of goods, or orders for the

delivery of either, between two countries, (at war) directly or indirectly, or through the intervention of third persons or partnerships, or by contracts, in any form looking to or involving such transmission are prohibited."

In Dooley *vs.* Smith, 13 Wallace, 604, the demurrer sustained to plea of tender of United States notes, shewed a Federal question raised. In this case the demurrer sustained to seventh plea, shews the same. The Acts of Congress, prohibiting intercourse without license, were involved in this case.

And especially were they, by the instructions which were refused.

In Trebilock *vs.* Wilson, 12 Wallace, 693, the Court held jurisdiction of the case because the construction of a Statute or the Constitution was drawn in question.

In this case the construction of the Acts relating to license for intercourse during the war, were distinctly drawn in question by the instructions asked; they could have meant nothing else.

In Furman *vs.* Nichol, 8 Wallace, 44, held that if it appear by clear and necessary intendment that the question arose, the jurisdiction attaches.

And it need not appear that the Court erred in judgment; for that is the very question to be argued in this Court.

In Maguire *vs.* Tyler, 8 Wallace, 650, even if the decree is silent on those points, yet if the decision would have been the other way, if the points raising the questions had been allowed, it is enough.

In State of Minnesota *vs.* Bachelder, 1 Wallace, 109, where a Statute of the United States is technically in issue in the pleadings, or is relied on in them, and is decided against by rulings asked for and refused, even though the case may have been disposed of generally on other grounds, the jurisdiction attaches.

It may be without a precedent to say that a State law, preventing the contract of Agency from being terminated by the principal, impairs the *obligation* of such a contract. Yet, in the case of Warwick *vs.* Manhattan Insurance Company, in 20 Grattan's Va. Reports, the Court held that the Statute in relation to Insurance

Companies, prevented the Companies from revoking Agencies created before the war. And in this case, the same Court decided upon the validity of the same Statute, and that it had the effect during the war to prevent the Plaintiff in Error from revoking its Agencies in Virginia during the war.

The real effect of this is to impair the obligation of the contract of Agency.

And the extreme injustice of the Va. Statute, as so construed, and its effect in so impairing the contract, is shewn by the fact appearing in the case in Grattan—that the State of Virginia held the Agency good, and the premiums received to bind the Company, *and then confiscated the money in the hands of the Agent.*

See Delmar *vs.* Insurance Company, 14 Wallace, 661, and see Bridge Proprietors *vs.* Hoboken Company, 1 Wallace, 116.

The Plaintiff in Error suggests—

First.—That this motion is one eminently proper to be heard in oral argument, with the argument on the merits.

Second.—That the brief of Defendant in Error is insufficient under the rules of this Court, or even independently of them, to enable the Court fully to decide upon the propriety of the motion to dismiss.

EDWARD OTIS HINKLEY,
For Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1875, No. 213.

THE NEW YORK LIFE INSURANCE COMPANY

vs.

HENRIETTA HENDREN.

In the Supreme Court of the United States,

OCTOBER TERM, 1875, No. 213.

THE NEW YORK LIFE INSURANCE COMPANY.

vs.

HENRIETTA HENDREN.

THE FACTS.

The New York Life Insurance Company, (the Plaintiff in error,) was incorporated under the laws of the State of New York, and was a mutual company. (Record, pa. 27.)

It insured the life of William T. Hendren, in favor of his wife Henrietta, (the Defendant in error,) by policy dated 25th August, 1856, in usual form, with condition as follows: viz.

"*In case the said Mrs. Henrietta Hendren shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, then, and in every such case the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine.*"

And in the margin of the policy were these words, viz.

"*All receipts for premiums paid at agencies are to be signed by the President or Actuary.*"

Premiums payable quarterly 25th days of February, May, August and November, $30 each. (See the Policy, pa. 14.)

The premiums were paid to 25th February, 1861, inclusive—and *five* quarterly premiums, making $150, remained unpaid, at death. pa. 28. R. H. Vaughan, brother of Defendant in error, was an Agent of Plaintiff, in Hampton, Virginia. pa. 16.

Mr. Hendren was living in Norfolk, when he was insured. (pa. 24.

Mr. Vaughan and Mr. Hendren, were both natives of Virginia, (pa. 25,) and continued to reside there until Mr. Hendren's death which took place on 18th August, 1862, at Richmond. (pa. 18.)

There was a general Agent, Mr. Charles E. Wortham, at Richmond, and the other Agents were all local Agents. Mr. Vaughan was local Agent for Elizabeth City County and vicinity. (pa. 24.)

Mr. Vaughan, who had been the Agent of the Company, became an officer in the Confederate army, at the commencement of hostilities and so continued, until his death. (pa. 18.)

No renewal receipts were sent to him for this policy, for premiums falling due at any date subsequently to 25th February, 1861. (pa. 31.)

Ferguson, another local Agent in Virginia, testified as follows:

"When the war broke out they ceased sending me receipts." * * * "the Company then stopped sending renewal receipts on policies of insurance, because communication was stopped on account of war." (pa. 20.)

"I did not receive any communication from the North until after the evacuation of Norfolk, May 10th, 1862, it was some time after that, before letters passed. My agency ceased after the war broke out, because the Company could not send me the renewal receipts for premiums due on policies.

"As Agent during the war, I made only private arrangements with parties who claimed the right to pay the premiums I returned the money in every case to the parties who so paid me. One of the rules of the Company, was that I should not receive any money except upon printed receipts signed by the President, or Actuary. That was one of the rules of the Company, sent to the Agents. (pa. 24.)

Mr. Hendren was living in Norfolk when he was insured. I took his insurance. I collected the premiums up to 1858. The last premium due, which I collected was that of February 25th, 1858. This was paid by me. I delivered the receipt and paid Company. When Mr. Hendren moved from Norfolk to Hampton, I no longer collected the premiums on his policy, but transferred him to Vaughan's list, as he had removed to his locality. When Mr. Hendren moved back to Norfolk, he was not put back on my list. I was not advised of his coming to Norfolk. Mr. Hendren did not nor did any one for him pay me any premiums

in 1861. If he was in Norfolk in 1861, he was in my locality." (pa. 24.)

Miss Bettie Vaughan says.—

"Mr. Hendren resided in Norfolk in 1861. Mr. Hendren moved to Richmond, in January, 1862. My sister, Mrs. Hendren, followed in the spring—April perhaps. The battle of Bethel, was fought June 10th, 1861, and Hampton was then in Federal lines." (pa. 25)

The Defendant in error, herself testified that she "had gone to Richmond, about last of April, or 1st of May, the city of Norfolk and Hampton, having fallen within the United States Army lines, on 10th May, 1862." (pa. 18.)

Mr. Hendren served under Col. Groner, as a Clerk in the Adjutant General's office of the Confederate States Army in Richmond in 1862.

OTHER EVIDENCE LEGALLY INADMISSIBLE.

Some evidence was offered by several witnesses including the Defendant herself, *of conversations* with the Agent Vaughan, after the commencement of hostilities, and when he, himself was in the Confederate Army—tending to prove, "that there was an agreement, between Mr. Vaughan and Mr. Hendren, about the payment of premiums, made in Hampton: that he, (Vaughan) would attend to them himself, and see them properly paid up." She said,—"I gave my gold watch and chain to Mr. Hendren, and he gave them to Mr. Vaughan, as security to Mr. Vaughan, for the personal responsibility he was assuming to Mr. Hendren."

This evidence was admitted by Judge Burroughs, on the trial at Norfolk, and made the subject of a *Bill of Exception*. (p. 20.)

The Supreme Court of Appeals of Virginia on the trial at Richmond, regarded this as error in the inferior Court, for they said:

"Vaughan, who was their agent before the war, and to whom the premiums had been paid up to the 25th of May, 1861, upon printed receipts signed by the President or Actuary, and countersigned by the local agent, in the mode prescribed by direction attached to the policy was not furnished with such receipts for the premium which fell due on 25th of May, 1861, or for any subsequent quarterly payments which fell due in the life time of the insured, which, in the absence of any waiver on the part of the Company or of any express instruction to receive payment,

must be regarded as evidencing a withdrawal of authority from the Agent to receive payment, as was held in White's case." (pa. 53.)

And afterwards, "that the declarations and admissions of R. H. Vaughan, as testified to by Mrs. Hendren, tending to prove his agency, or the payment of premiums during the war, as set out in the second bill of exceptions are not necessary to support the verdict, or the Plaintiff's right of action."

The Court of Appeals therefore, although regarding the admission of this testimony as an error, did not decide the case on that ground, and so it is immaterial to be considered by this Court, being here only inserted to clear the case of any unnecessary evidence, or point.

OTHER EVIDENCE INSUFFICENT TO PROVE PAYMENT OF PREMIUM.

Ferguson testifies thus: "The dividend due Mrs. H. Hendren, for that year up to March, 1860, by this account is $36." "Mrs. H. was entitled to dividend from 1st of 1857 for each year thereafter." pa. 24. Scrip certificates are issued for these dividends. pa. 23. "And after this Scrip had been issued five years, the Company then took in the Scrip for the first of the preceding five years, in part payment of the year's premium then due, or paid it in cash."

But the Defendant in error, herself, had offered evidence by Adams, that "he went to the office of the Defendant in New York, in the fall of 1868, as he had been requested to do by Mrs. Hendren; that he had got the dates and No. of the policy from Mrs. Hendren; that he saw the President of the Company and told his errand; that the President called a Clerk, and the Clerk brought a book, and the President after examining the book, said that the policy had lapsed some two or three months before Hendren died."

It was contended by the counsel, who argued the case in the lower Court for Mrs. Hendren, that her dividends amounted to enough to pay these premiums. There are three answers to this, viz: (1) those dividends that were good tenders, viz: after five years were *not enough*; (2.) they *never were tendered*; (3.) *Vaughan was no longer agent* after he went into the war.

First. Up to March, 1860, Mrs. Hendren had received her Scrip for her dividends.

Then there was at most due to her in March, 1861, and March, 1862, provided she had paid her premiums in the meanwhile dividends of $36 each, for which she was entitled to Scrip, and *after five years*, from those dates respectively, she would have been entitled to use them in payment of her premiums.

As to the other Scrip which she had received, she would have been entitled in 1862, to pay the dividend of 1857, say $36, in part payment of her premiums becoming due in that year, viz: 4 premiums of $30 each,=$120.

So it was not enough, even if the Company had a right to apply it, or was obliged to apply it while yet in her hands.

Secondly. She herself held this Scrip and not the Company, and there is absolutely no payment or tender of it to the Company. Even if it would have been a good tender, it was never made. Where was it? She may have sold it. She did not even offer to surrender it at the trial.

Thirdly. There could not have been any payment or tender of this Scrip, for the Court plainly says there was no Agent to receive it. Vaughan's Agency being, as they admit, at an end.

It is unnecessary, therefore, to consider that point further, except to say that the Court of Appeals of Virginia, looked at this point only with a view to consider whether the verdict was excessive. pa. 53 and 54.

The Court's opinion, therefore, as to the right to recover was not based on that ground; but upon the single fact as just stated, that there was no Agent to receive payment of premiums in any manner; but they say that under the Statute of Virginia there ought to have been, to which point we now come:

The Virginia Statute, in reference to Life Insurance Companies, which is referred to in the Opinion of the Court, is as follows:

VIRGINIA CODE,

Of 1860, ch. 39, page 240,

RELATING TO

FOREIGN INSURANCE COMPANIES.

See 1855–6, page 26, ch. 18 and 1857–8, page 10, ch. 13.

SECTION 23. No insurance company, unless incorporated by the legislature of this Commonwealth, shall make any contracts of insurance within this State, until such insurance company shall have complied with the provisions of this act.

24. Every such insurance company shall, by a written power of attorney, appoint some citizen of this Commonwealth, resident

therein, its agent or attorney, who shall accept service of all lawful process against such company in this Commonwealth, and cause an appearance to be entered in any action, in like manner as if such corporation had existed and been duly served with process within this State.

25. A copy of such power of attorney duly certified and authenticated, shall be filed with the Auditor of Public Accounts of this Commonwealth; and copies thereof, duly certified by said auditor, shall be received in evidence in all courts of this Commonwealth.

26. If any such agent or attorney shall die or resign, or be removed, it shall be the duty of such corporation to make a new appointment as aforesaid, and file a copy with the said auditor of public accounts as above prescribed, so that at all times, and while any liability remains outstanding on such insurance, there shall be within this State an attorney authorized as aforesaid; and no such power of attorney shall be revoked until after a like power shall have been given to some competent person, and a copy thereof filed as aforesaid.

27. Service of process upon such attorney shall be deemed to be sufficient service upon his principals.

28. If any such insurance company shall make insurance as aforesaid, without complying with the requisitions of this act, the contract shall be valid; but the agent or attorney of such company, acting within this State, respecting the effecting of any policy of insurance, shall forfeit a sum not exceeding one thousand dollars nor less than three hundred, for such offence; and every person shall be deemed an agent of such company who shall receive or transmit proposals for insurance, or receive for delivery policies founded on proposals forwarded from this State, or otherwise, to procure insurance to be effected by such insurance company for persons residing in this State, or who shall receive payment for such policies, and shall be subject to the restrictions and liable to the penalties specified in this act.

29. Every person acting as an agent in this State for any insurance company not incorporated by the Legislature of this Commonwealth, shall, on the first Monday of October or May in every year during the continuance of his agency, make a return on oath to the auditor of public accounts of the amount of premiums received and assessments collected during the said period, and shall at the same time pay into the treasury such tax as may be imposed by law on the amount of such premiums and assessments; and the whole sum received for policies, whether paid in

money or in other obligations, shall be deemed to be premiums for the purposes of this section.

30. If any such company, through their attorney, shall neglect to make such returns and payments as are required in the preceding section, or shall make the same fraudulently or falsely, they shall for every such offence forfeit a sum not exceeding one thousand dollars.

31. Every such company, through their agent or attorney, shall before making or procuring to be made any contract of insurance as aforesaid, give bond to the auditor of public accounts, with two or more securities, to be approved by him, in the sum of not less than one thousand dollars nor more than five thousand dollars, at the discretion of the auditor of public accounts, with conditions to make the semi-annual returns before required, and to pay the tax.

32. If any person shall act, otherwise than provided by the second section of this act, as agent for any such company, to make or renew, directly or indirectly, any contract of insurance within this State, and with any persons resident therein, without having complied with the requisitions of this act, or in any way contrary to the true intent and meaning thereof, he shall forfeit and pay, for every such offence, the sum of five hundred dollars.

33. It shall be the duty of the attorney general and Commonwealth's attorneys of this Commonwealth to cause the provisions of this act to be enforced.

34. All penalties recovered for violations of the provisions of this act shall go, one-half to the persons giving information of such violations, and one-half to the literary fund.

35. The tax to be paid by the agents of foreign insurance companies, according to the provisions of this act, shall be in lieu of the tax prescribed by law to be paid by them before the passage of this act.

THE SEVENTH PLEA is as follows:

7. And for a further plea in this behalf, the said Defendants, by their said attorneys, say: That at the time of making of the said promise by the said Defendants, by the said Plaintiff thereof, above alleged in her said declaration, the said Defendants were, and have continued since to be, a corporation duly
page 11 incorporated under the laws of the State of New York, and as such was and continued to be, a citizen of and at peace with the Government of the United States. And that the said Wm. T. Hendren and Henrietta his wife, the Plaintiff

in this action, after the making of the said promise by the said Defendants, by the said Plaintiff, so alleged, were to wit: from the 16th day of August, A. D. 1861, to the time of the death of the said Wm. T. Hendren, and continued to be residents of the State of Virginia, and did connect themselves with the Government of the so-called Confederate States of America, and voluntarily reside within its military lines, and did continue to reside within, and be connected with the said Government during the said time; which said Government and States, were and continued to be in open hostility to, and engaged in war with the Government of the United States, from the 16th day of August, A. D. 1861, to the time of and after the death of he said Wm T. Hendren; and this the Defendants are ready to verify.

A demurrer to this plea was sustained.

The Instructions in this case were as follows:

Plaintiff's instruction.

The plaintiff prays the Court to instruct the jury on the pleadings and evidence, that if they believe that the policy of insurance, offered in evidence, was executed by the Defendant and signed by the president and actuary of said Defendant and delivered to the plaintiff, and that the William T. Hendren referred to in said policy died on the 15th or 18th of August, 1862, and that due notice and proof of the death of said William T. Hendren were served on the Defendant more than eighty days before the institution of this suit, and should they find, that from the date of said policy up to the time of his death, the said William T. Hendren did not pass beyond the settled limits of the United States that lie east of the Rocky mountains, and did not, during the said period, visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Kentucky or Virginia, and did not, within the said period, enter into any military or naval service whatever, the militia not in actual service excepted, and shall further find that the said William T. Hendren did not die in, or in consequence of a duel, or by the hands of justice, or in the known violation of any law of the United States or of any State or county, and shall further find, should they believe him to have died as testified to, that his death was not caused by intoxicating drink or opium, and further, that the declaration made by the Plaintiff on the 20th

August, 1856, should they find such declaration to have been made, and at that time, was not in any respect untrue, and further, that the Plaintiff or some one on her behalf, did pay the several premiums as set forth in said policy to the Defendant or its Agent for that purpose, on or before the several
page 53 days mentioned in said policy for the payment thereof up to the time of the death of said Hendren as certified, and shall further find, that all conditions and things to be complied with and performed by the said William T. Hendren and the Plaintiff respectively, have been complied with and performed by them respectively, and that the sum of $5000 mentioned in said policy, nor any part of it hath been paid to the Plaintiff, then the Plaintiff is entitled to recover the said sum of $5000, with interest on the same, (should the jury see fit to allow it) from the end of sixty days after they may find due notice and proof of the death of said William T. Hendren, to have been given to the Defendant, should they find from the evidence, the due notice and proofs aforesaid to have been so given, and death to have occurred as testified to.

And the Defendant offered by its counsel, the several instructions following, marked respectively, from 1—23 inclusive:

Instruction No. 1.

That in contemplation of law, war existed between the United States and the Confederate States from 19th Aug. 1861, and that war dissolved the agency of Vaughan for Defendant, and therefore, the Plaintiff cannot recover, unless the jury find that the Defendant did actually receive all the premiums on the policy of insurance given in evidence which became due prior to the death of Mr. Hendren and any agreement which Mr. Vaughan made after the commencement of the war to pay the premiums, is no evidence of such payment, unless the jury further find that said Vaughan did actually transmit the premiums to the Defendant or in some manner account to them for the same.

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Instruction No. 2.

That the war revoked the agency of R. H. Vaughan for the Defendant, and that as to the premiums falling due on the policy after the 16th day of August, 1861, no agreement of said Vaughan

with the Plaintiff or her husband whether made before or during the war could bind the Defendant.

Instruction No. 3.

That if the jury find that R. H. Vaughan, agent of the Defendant, did, from the year 1861 to the time of his death engage in actual hostilities with the United States by joining the army of the Confederate States, then his agency ceased from the year 1861, and the Plaintiff is not entitled to recover, because there is no sufficient evidence of any payment of the premiums on the policy of insurance given in evidence after the year 1861, to the death of said Hendren.

Instruction No. 4.

That if the jury find that from the commencement of hostilities about April, 1861, until his death in Feb., 1864, R. H. Vaughan, who was agent of the Defendant was in actual service of the Confederate army and a combatant against the United States, then his agency terminated at the time of his entering that service and none of his acts thereafter bind the Defendants, unless known to them, and assented to by them, of which there is no evidence.

Instruction No. 5.

That if the jury find, that at the time the policy of insurance given in evidence in this case was effected, Mr. and Mrs. Hendren were citizens of Virginia and residents of the City of Norfolk, in said State, and R. H. Vaughan the agent of the defen-
page 55 dant was a citizen of Virginia and a resident of Hampton, in said State, at that time and afterwards until the commencement of hostilities between the United States and the Confederate States, and that said hostilities commenced in the year 1861, and that on the 10th of May, 1862, or before Norfolk and Hampton and also Yorktown, at which latter place said Vaughan then was, fell within the lines of the United States and that the said Mr. and Mrs. Hendren and Vaughan all voluntarily removed at that time or shortly prior thereto to the City of Richmond and voluntarily placed themselves within the lines of the Confederate Government, and thus avoided the consequences which would have ensued if they had remained, viz: that they both would have

been within the lines of the United States, and the said Vaughan had from the commencement of hostilities as aforesaid, until the time of his death, been in the service of the Confederate States in the army, that then said Vaughan could not after said 10th May, 1862, be considered the agent of the Defendant and any dealing with him after that date by either Mr. or Mrs. Hendren or payment to him of premiums could not bind the company, and if premiums could have been by said Mr. or Mrs. Hendren paid to the agent of the Defendant at Norfolk or transmitted to New York if they had remained in Norfolk, and that by reason of said removal of said Vaughan and Mr. and Mrs. Hendren the premiums coming due on the 25th May, 1862, could not be paid to the Defendant, and has in fact never been paid to the company, then the Plaintiff cannot recover.

Instruction No. 6.

That if the jury believe that R. H. Vaughan changed his residence without the knowledge or consent of the Defen-
page 56 dant, from Elizabeth City County to Richmond City or Mecklenburg County, such removal did not carry with it the agency for the Defendant, and said Vaughan had no authority by virtue of his appointment as agent at Elizabeth City County to act as such at Richmond City or Mecklenburg County.

Instruction No. 7.

If the jury shall believe from the evidence in this case that R. H. Vaughan made an agreement with the Plaintiff or with Wm. T. Hendren to the effect that he, Vaughan, would see to the payment to be made on said policy for premiums due on the 25th days of May, August and November, 1861, and on the 25th days of February and May, 1862, and keep the said policy of insurance in full power and effect; that the said R. H. Vaughan then became for that purpose the agent of the said Plaintiff, and as such agent of the said Plaintiff no evidence of the fact of said payment based on the declaration of the said R. H. Vaughan can bind the Defendant, unless the Defendant had full knowledge of the facts of said agreement and ratified and confirmed the same.

Instruction No. 8.

If the jury shall believe from the evidence that Wm. T. Hendren made an agreement on behalf of the Plaintiff with R. H. Vaughan for the payment of several premiums due on the 25th days of May, August and November, 1861, and the 25th days of February and May, 1862, and that the only evidence of payment are the declarations of said Vaughan made to said Plaintiff in pursuance of said agreement, they shall find for the Defendant.

Instruction No. 9.

That if the jury find that the Plaintiffs did not obtain
page 57 from the company receipts for the premiums which fell due on the 25th days of May, August and November, 1861, and on 25th days of February and May, 1862, signed by the president or actuary, then the Plaintiff is not entitled to recover, notwithstanding they may find that she obtained receipts signed by R. H. Vaughan unless the Defendant in some manner, ratified said payments to Vaughan.

Instruction No. 10.

That during the war, the Defendant itself could have no kind of business communication or intercourse with the Plaintiff in the Confederate lines, unless specially licensed thereto by the United States Government, and that the Defendant could not do by an agent what it could not do by itself.

Instruction No. 11.

If the jury shall believe from the evidence that from and after the 19th day of April, 1861, communication ceased between New York, and Norfolk, and Hampton in Virginia, in consequence of the war; then the New York Life Insurance Company were excused from sending renewal receipts to their agents in Virginia until the communication was re-opened, even though the jury may find it had been the custom or was the duty of the said company to send such renewal receipts before the commencement of said war.

Instruction No. 12.

If the jury shall believe from the evidence that at the time of making the policy of insurance on the 25th day of August, 1856, the said William T. Hendren and Henrietta Hendren, the plaintiff, in this suit were residents of the city of Norfolk and
page 58 the State of Virginia; that afterwards the said William T. Hendren removed to and resided in the town of Hampton, in the State of Virginia, up to the year 1861, during all which time there was open communication between the city of *Nork*, the home office of the Defendant, and the said cities of Norfolk and town of Hampton; that in April 1861, the said communication between New York and the said city of Norfolk and town of Hampton was cut off by the existence of the war then pending between the United States and Confederate States; that shortly after, or about the beginning of said hostilities, the said Wm. T. Hendren and Henrietta Hendren removed from the said town of Hampton to the city of Norfolk; that the communication between the said town of Hampton and the city of New York was resumed in June 1861; that afterwards, in January 1862, the said Wm. T. Hendren removed from the city of Norfolk to the city of Richmond, and there continued to reside up to the time of his death; and afterwards, some time in April or May 1862, just before the evacuation of the city of Norfork, the said Henrietta Hendren removed to the said city of Richmond, to reside there with her husband, the said Wm. T. Hendren, and did so reside to the time of his death; that afterwards, on the 10th of May 1862, the said city of Norfolk was evacuated by the Confederate forces, and occupied by the Federal troops, and that communication between the said city of New York and city of Norfolk was thereby resumed; and that the said Wm. T. Hendren and Henrietta Hendren, by so removing to Richmond, removed themselves further from direct communication with the city of New York, and rendered the same impossible by remaining in Richmond, and within the Confederate lines, whereas they might have been in communication with the city of New York, by remaining in either the city of Nor-
page 59 folk or the town of Hampton, then the said Defendant is, in contemplation of law, excused from sending either notices of the times of payment or receipts signed by the President or Actuary, or from doing any other thing by them to be done and performed on their part, for the purpose of keeping the said policy of insurance in force; and from and after such removal to points

Instruction No. 8.

If the jury shall believe from the evidence that Wm. T. Hendren made an agreement on behalf of the Plaintiff with R. H. Vaughan for the payment of several premiums due on the 25th days of May, August and November, 1861, and the 25th days of February and May, 1862, and that the only evidence of payment are the declarations of said Vaughan made to said Plaintiff in pursuance of said agreement, they shall find for the Defendant.

Instruction No. 9.

That if the jury find that the Plaintiffs did not obtain
page 57 from the company receipts for the premiums which fell due on the 25th days of May, August and November, 1861, and on 25th days of February and May, 1862, signed by the president or actuary, then the Plaintiff is not entitled to recover, notwithstanding they may find that she obtained receipts signed by R. H. Vaughan unless the Defendant in some manner, ratified said payments to Vaughan.

Instruction No. 10.

That during the war, the Defendant itself could have no kind of business communication or intercourse with the Plaintiff in the Confederate lines, unless specially licensed thereto by the United States Government, and that the Defendant could not do by an agent what it could not do by itself.

Instruction No. 11.

If the jury shall believe from the evidence that from and after the 19th day of April, 1861, communication ceased between New York, and Norfolk, and Hampton in Virginia, in consequence of the war; then the New York Life Insurance Company were excused from sending renewal receipts to their agents in Virginia until the communication was re-opened, even though the jury may find it had been the custom or was the duty of the said company to send such renewal receipts before the commencement of said war.

Instruction No. 12.

If the jury shall believe from the evidence that at the time of making the policy of insurance on the 25th day of August, 1856, the said William T. Hendren and Henrietta Hendren, the plaintiff, in this suit were residents of the city of Norfolk and
page 58 the State of Virginia; that afterwards the said William T. Hendren removed to and resided in the town of Hampton, in the State of Virginia, up to the year 1861, during all which time there was open communication between the city of *Nork*, the home office of the Defendant, and the said cities of Norfolk and town of Hampton; that in April 1861, the said communication between New York and the said city of Norfolk and town of Hampton was cut off by the existence of the war then pending between the United States and Confederate States; that shortly after, or about the beginning of said hostilities, the said Wm. T. Hendren and Henrietta Hendren removed from the said town of Hampton to the city of Norfolk; that the communication between the said town of Hampton and the city of New York was resumed in June 1861; that afterwards, in January 1862, the said Wm. T. Hendren removed from the city of Norfolk to the city of Richmond, and there continued to reside up to the time of his death; and afterwards, some time in April or May 1862, just before the evacuation of the city of Norfork, the said Henrietta Hendren removed to the said city of Richmond, to reside there with her husband, the said Wm. T. Hendren, and did so reside to the time of his death; that afterwards, on the 10th of May 1862, the said city of Norfolk was evacuated by the Confederate forces, and occupied by the Federal troops, and that communication between the said city of New York and city of Norfolk was thereby resumed; and that the said Wm. T. Hendren and Henrietta Hendren, by so removing to Richmond, removed themselves further from direct communication with the city of New York, and rendered the same impossible by remaining in Richmond, and within the Confederate lines, whereas they might have been in communication with the
city of New York, by remaining in either the city of Nor-
page 59 folk or the town of Hampton, then the said Defendant is, in contemplation of law, excused from sending either notices of the times of payment or receipts signed by the President or Actuary, or from doing any other thing by them to be done and performed on their part, for the purpose of keeping the said policy of insurance in force; and from and after such removal to points

within the Confederate lines, all communication between the said Vaughan and Hendren and the said Company was illegal.

Instruction No. 13.

If the jury shall believe, from the evidence, that the New York Life Insurance Company is a mutual company, duly incorporated under the laws of the State of New York, then the said Henrietta Hendren, the holder of a policy on the life of Wm. T. Hendren, was a member of said company, as a partner, and being such partner, her rights in said company accruing after the 19th day of April, 1861, were revoked by the declaration of war, provided the said Henrietta Hendren at that time was a citizen and resident of Va., and continued to reside in the lines of, and to be subject to, the Confederate Government at Richmond, until the death of her husband.

Instruction No. 14.

If the jury believe, from the evidence, that the New York Life Insurance Company was a mutual company, and that the plaintiff was a policy-holder therein, then the plaintiff was bound by all the laws and regulations of the company, and the acts of the company were her acts, and she was bound to know that R. H. Vaughan had no authority, as agent, to receive the payment of premiums without the receipt signed by the president
page 60 or actuary (and that any payment, or agreement for payment, of the premiums on her policy, without the delivery to her of the said receipt, would not bind the company, unless the said premiums were actually paid to the said company as they fell due,) and that the said Vaughan, as agent, had no authority to make any agreement for payment of the premiums that would bind the company, unless the premiums were promptly paid as they fell due.

Instruction No. 15.

That if the jury believe, from the evidence, that the New York Life Insurance Company did not receive the premiums falling due on the policy during the war, they must find for the defendant, notwithstanding they may believe that the payments were made to Vaughan.

Instruction No. 16.

That, in legal contemplation, a war existed between the United States and the Confederate States from 16th August, 1861, until after the year 1864; that a corporation, incorporated by the State of New York, must, for the purposes of this suit, be considered a citizen of the United States, and a citizen and resident of the State of Virginia during the late war must be considered a citizen of the Confederate States; that no commercial intercourse was lawful between any of the citizens of the United States and any of the citizens of the Confederate States during the war between them, without license of the governments of those States respectively, and there being no evidence of any such license in this case, the jury cannot presume that Vaughan did transmit the premiums on the policy of insurance given in evidence, or in any manner account for them to the defendant, without positive evidence of that fact.

Instruction No. 17.

That during the war, the defendant itself could have no kind of business, communication or intercourse with the plaintiff in the Confederate lines, unless licensed by the U. S. government, and that the defendant could not do by an agent what it could not do by itself.

Instruction No. 18.

The Court instructs the jury, that if they believe, from the evidence in this case, that there was printed on the margin of the policy of insurance offered by the plaintiff in evidence in this cause these words, "All receipts for premiums paid at agencies are to be signed by the president or actuary," and that the premiums on said policy due respectively on the 25th days of May, August and November, 1861, and on the 25th days of February and May, 1862, by any arrangement or agreement between the assured and R. H. Vaughan, were paid to him without the knowledge or assent of the defendant, in any manner otherwise than in accordance with the said words on said margin, then they shall find for the defendants.

Instruction No. 19.

If the jury believe, from the evidence, that the alleged agent, R. H. Vaughan, received the premiums due on the 25th days of May, August and November, 1861, and February and May, 1862, without receipts signed by the president or actuary of the New York Life Insurance Company, they shall find for the defendant, unless they believe that the said company, with full knowledge of all the facts of said payment, afterwards fully ratified and confirmed the same.

Instruction No. 20.

The Court instructs the jury, that if they believe from
page 62 the evidence that an agreement was made by the assured with R H. Vaughan as to the payment of the premiums on said policy of insurance, in evidence, which fell due on the 25th days of May, August and November, 1861, and February and May, 1862, other than upon the receipt signed by the president or actuary of the company, and that the said defendant knew nothing of said agreement, then they shall find for the defendant, unless they further believe that the said defendant afterwards, with full knowledge of all the circumstances, ratified and confirmed the said agreement.

Instruction No. 21.

If the jury shall believe from the evidence that the payments alleged to have been made by the said Henrietta Hendren, or by any person for her, as and for her premiums due on the 25th days of May, August and November, 1861, and February or May, 1862, to the said R. H. Vaughan, as the agent of the defendant, were not made in gold and silver, or other legal tender of the United States, they shall find for the defendant.

Instruction No. 22.

If the jury shall believe from the evidence that V. D. Groner was a captain in the adjutant general's office of the Confederate States of America, and that the said Wm. T. Hendren was at any time, after the making of the policy of insurance given in the evidence in this case, in the employment of said V. D. Groner, as a clerk, then they shall find for the defendant.

Instruction No. 23.

That if the jury find that Wm. T. Hendren, after the page 63 execution of policy of insurance given in evidence, was employed as a clerk in the office of the adjutant general of the Confederate States, said employment is in legal contemplation an entering into military service, within the meaning of said policy. and the plaintiff is not entitled to recover.

And thereupon the Court granted the instruction of the plaintiff, and rejected the instruction of the defendant, except 12, which was granted, and the Court having modified the 7th instruction, gave it thus, as follows, to wit:

If the jury shall believe from the evidence in this case that R. H. Vaughan made an agreement with the plaintiff, or with Wm. T. Hendren, that he, Vaughan, would see to the payments to be made on said policy for premiums due on the 25th days of May, August and November, 1861, and on the 25th days of February and May, 1862, and keep the said policy of insurance in full force and effect, that the said R H. Vaughan then became for that purpose the agent of the said plaintiff. Notwithstanding this, if Vaughan was agt. for deft., to receive premiums on policies, his declarations as such agent, that premiums were paid, are proper evidence to go to the jury on issue raised in pleas of deft.

THE OPINION.

In affirming the decision of Judge Burroughs, of the Norfolk Court, sustaining the demurrer to seventh plea, the Court of Appeals uses this language. (Record, p. 54.)

"The company was bound to keep an agent here continuously to receive premiums and to pay policies."

Again, (record, p. 55,) the Court, on the same point as brought up in the instructions, says:

"The 10th and 17th instructions are identical, and announce an abstract principle which, we think, under the terms of the act of assembly is not law, to wit, that 'the defendant could not do by an agent what it could not do by itself.'" The Defendant in fact being a corporation, could do nothing except by agents; but if it is meant that this company could not do by its agent in Virginia what it could not do through its New York agent, it is not true. The prohibition of the act of assembly which was in force at the date of this policy, and ever since, is that no person shall act

otherwise than is provided in the 2nd section of the act, as agent, for any such company, to make or renew, directly or indirectly, any contract of insurance within this State and with any person resident therein, without complying with the requisitions of this act, or in any way contrary to the true intent and meaning thereof, under the penalty of five hundred dollars.—Code of 1860, p. 241, sec. 32.

"The section referred to requires that the company shall appoint some citizen of the Commonwealth resident therein its attorney or agent—sec. 24; in the original act sec. 2. Thus it appears that the company can only contract through its resident agent in this State, to whom, by the contract and the statute, premiums are to be paid. For construction of Statute see

Warwick *vs.* Manhattan Ins. Co., 20 Grattan.

"When this company undertook to do business in this State, it was upon the terms of this statute. And those recited show that the company could do by its agent in Virginia what it could not do by its officers or agents of New York."

MOTION TO DISMISS.

The Briefs on this motion were filed at the last term, when the motion was made, and it was ordered to be heard with the argument on the merits. In addition to the argument made in the brief, the plaintiff in error suggests that the question turns on the decision of the Virginia Court of Appeals, giving such an efficacy to their own statute as to nullify a statute of the United States, which was relied on.

This appears in the pleas, in the instructions requested, and in the opinion of that Court.

That such nullification of the statute of the United States is error, hardly needs argument.

If it be error, then this Court will consider the other questions; and if it be apparent from the whole case that the decision must have been the other way but for that error, then this Court will reverse. See

Murdock *vs.* City of Memphis, 20 Wallace, 590.

If there be such error, we go on to enquire further into the merits of the case.

ASSIGNMENT OF ERRORS.

The Plaintiff in Error assigns as errors:

1st. The allowing of the demurrers to 7th plea, herein before set forth.

2d. The granting of the Plaintiff's instruction and refusing of Defendant's several instructions herein before set forth.

POINTS OF ARGUMENT.

1st. The statute of the United States prohibiting intercourse was valid under the Constitution, and the construction of the Court of Appeals of Virginia was against its validity. And it is not under the public law that the intercourse is prohibited, but under the legislative act, in pursuance of the Constitution.

2d. The contract constituted the Defendant in Error a *quasi partner* of the company, because it was a *mutual* company; and the effect of the war upon *such a contract* was to dissolve the *quasi* partnership, and thus render void or impossible any further execution of the contract by either party, after the beginning of the war.

3d. The parties *were enemies*, and further insurance, after the commencement of the war, was unlawful, because against *public policy*. The general doctrine is, that all on one side are enemies of all on the other, which includes even non-combatants. Here we have the additional fact that *the man insured was assisting the enemy*. Record, p. 27, and Instructions 22 and 23 on p. 38, and the 7th Plea.

4th. Even if lawful, the company had a right to refuse to be bound by a *further* or by a *future* or *postponed* performance of the contract when it became impossible for the assured to perform it in the manner originally intended by both parties, viz: by the *regular notification* to the company from time to time, as stipulated in the policy *of her election to continue it*.

5th. If the assured can recover any thing, it must be only *the value of the policy*, on the day up to which the last payment which was actually made did extend, with interest, and including any dividends and profits up to that date.

THE ARGUMENT.

First Point.

The Preamble of the Constitution recites its objects, and the Legislative powers which are vested in Congress, show the validity of the Acts prohibiting intercourse during war.

To give such a construction to a State Statute, as to nullify this Act is a direct blow at the supremacy of the Governmental power of the Nation, intended to secure to the people the blessings enumerated in their own pragmatic sanction of them.

The seventh plea, and the several instructions above referred to show very plainly that this act was referred to. The decisions of this Court, enumerated in the brief on motion to dismiss, show how this question has heretofore been reached.

It must be observed too, that the war was made and the armies raised by Congress, as well as the Act passed relating to intercourse, under the powers mentioned in the Constitution, and it is under this authority expressly conferred that the intercourse was unlawful and not under Public or international law. As common law ceases, when a Statute is enacted, so Public law does not govern where the Constitution provides.

Now as to the Virginia Statute before quoted. In the case of Manhattan Life Ins. Co. *vs.* Warwick, 20 Grattan, 614—two Judges—viz. Christian, and the Chief Judge, Moncure, dissented from the opinion of the other three judges, and said: after quoting the Statute, "now in all these sections there is not a line or word, which imposes upon the Company the obligation to keep an agent for the purpose of receiving the premiums upon their policies as they become due, or which requires the payment here instead of the place where the Company has its domicil. The object of the Statute is two fold, first, to enable parties assured by Foreign Insurance Companies, to bring their suits in the Courts of this State, instead of going before foreign tribunals to assert their rights; and therefore, the law imposes a condition upon such companies, that they shall not engage in business in this State, unless they keep an agent, as long as they have outstanding liabilities, who shall acknowledge service of process which shall be deemed sufficient service on his principal. And second, to insure the punctual payment into the Treasury of the State, of all taxes assessed upon such companies. These upon a fair interpretation of the statute referred to are its leading and manifest objects. It would be a strained and unwarrantable con-

struction to carry it to the extent, for which it is invoked by the counsel for the Appellee. But giving to this statute the most liberal and latitudinous construction, making it embrace objects, which neither its language or spirit indicates, can it be maintained, this statute enacted in time of peace, applicable to times of peace, shall override the public and universal law of nations, and compel obedience even from alien enemies not without its jurisdiction? Could this statute compel the appellant to appoint an alien enemy, to act as his agent in Virginia, or to keep an alien enemy as his agent, when by the law of the Confederate States, which was admitted and recognized as the supreme law of Virginia, such agent was bound to pay over every dollar belonging to his principal, to the public sequestrator? I think not, the refutation of such a proposition, is found in its simple statement. It would be a solecism in law and reason to say that the Appellants should, (though their contract did not require it upon some vague and undefined notions of supposed hardship, and injustice) be required to keep an agent in the enemies country, to receive premiums due his principal, which it was his duty to remit or keep safely for his principal, but, which he was required by the laws of the belligerent State under heavy penalties, to pay over to the public sequestrator."

Again, in Spratley *vs.* Mutual Beneficial Life Insurance Company, 4 Bigelow Ins. Reports, 86, a case arising under an Insurance in Virginia, and involving the same Statute, the Court of Appeals of Kentucky, held this language:

"It may be that the laws of Virginia, gave to Foreign Insurance Companies doing business in that State before the war, "a sort of local existence," as held by a bare majority of the Virginia Court of Appeals, in the case of the Manhattan Life Insurance Company *vs.* Warwick, 20 Grattan.

"But if this be true, it is equally true that the course pursued by Virginia in the war between the States, effectually uprooted and destroyed 'the sort of local existence' this Appellee had in that State. Its domicile was within a State adhering to the Federal Government, and from the time hostilities between Virginia and the Federal Government, this Appellee could not comply with the laws of Virginia, and therefore without fault on its part; it lost its quasi local habitation in that State, and, as a matter of necessity, assumed towards Virginia and her laws, its original character of a foreign corporation.

"But in addition to all this, the policy of insurance was a New Jersey contract, to be performed, so far as the payment of insurance was concerned in New Jersey. The Company was expelled from Virginia by force, and was under no obligation to send Agents to that State after hostilities ceased, either to solicit further business or to put it in the power of Virginia Creditors to sue it in the Courts of that State."

Judge Carpenter holds similar language in Worthington *vs.* Charter Oak Insurance Company, Connecticut Reports.

Judge Emmons, in the Tait case refers to same Statute.

SECOND POINT.

The following cases illustrate the doctrine of *quasi partnership*, in cases of Mutual Life Insurance Companies:

In White *vs.* Madison, 23 New York 117, *held* the power of an Agent to insure does not authorze insurance in Mutual Companies, which would make the principal an insurer of others.

In Great Falls *vs.* Hewey, 45 N. H., 300.

By-laws in conflict with Charter cannot bind member of mutual Company.

Teadway *vs.* Hamilton Mutual Insurance Company, 29 Ct., 69.

Member of Mutual Insurance Company is bound to take notice of and observe its by-laws.

In Mutual Life *vs.* Deale, 18 Md., 648, *held* the charters of Mutual Companies make the assured, members and partners.

And see 50 Pa., 340.

The duty or privilege of such member to assist in electing officers must cease during war.

THIRD POINT.

The case of Penn and Mitchell, Assignees of Snowden *vs.* The Mutual Life Insurance Company of New York, was one of the earliest cases, if not the very first, in which the subject was considered of the insurance of the life of one in the so-called Confederate States, during the late war.

The action was commenced in July, 1865, and tried before Judge Martin, in the Superior Court of Baltimore City.

Brief reference is made to it in Bliss on Life Insurance, p. 643. It was there held that the life of a citizen, residing within the belligerent lines is not insurable; because he was subject at all times, and under all circumstances, to be commanded by the powers that control the operations of the enemy.

In the case of Sands *vs.* The New York Life Insurance Company, Judge Robertson, (then referee,) decided the same thing, and the Penn and Mitchell case was referred to. See Bliss on Life Insurance, p. 623. And Judge Christian, in his dissenting opinion in the Manhattan Life Insurance *vs* Waddington, 20 Grattan, 614, held that the war *terminated* the policy. In the Tait case the same point is decided by Judge Emmons.

Here the question is not the general one, whether war *ipso facto* terminated the policy in all cases, *and it may not be necessary to decide that question.* But whether Mr. Hendren's service as a Clerk in the Adjutant General's Office, is 1*st.* Military Service within the terms of the Policy, and if not, then 2*nd*, whether it is *such service* of the enemy as connects him with the Government, and renders the Policy unlawful thereafter, as a matter of *public policy.*

In the case of Dillard *vs.* Manhattan Life Insurance Company: Bliss on Life Insurance, 645. The Supreme Court of Georgia, held that the assured having occupied the position of post quartermaster, avoided the Policy according to its terms.

Now a Clerk is *the hand* of a Military man, for he may write for men, ammunition or food to be sent to a certain place,—does he not *serve* therefore, in the Military operations. Is he not quite as much in Military service as a cook on a vessel of war? See 4 Bradford's Surrogate, case 154, ex-parte Thompson.

The Trumpeter in the fable, who pleaded for his life when taken by the enemy, pleaded in vain that he did not kill but only made music, and was therefore innocent; he was answered that he aided and *served* those that did.

FOURTH POINT.

In Hamilton *vs.* Dillon, 21 Wallace, 73, held: "The war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Con-

gress or proclamations of the President;" and the act of Congress of 13th July, 1861, (12 Statutes at Large, 257,) is referred to, which prohibited commercial intercourse.

The proclamation of 16th August, 1861, in pursuance of said act, also prohibited intercourse.

But then it is said that the sending of money for the purpose of punctually paying the premiums was not necessary *during the war*, because the existence of the war formed a valid excuse—that it was a debt which was due to the Company, and they might recover it after the war. But here lies the error: the premiums to be paid from time to time in future constituted no debt, but there was only an option or privilege to the insured to pay at a certain time and in a certain manner, and if not so paid the Company had no right at all to collect them.

The question then turns solely on this point; the injustice of extending this option or privilege indefinitely, that is, as long as the war might last, four years or twenty years, if it should so happen, and all this without any equivalent whatever—any consent or any possibility of knowing how the insured may choose to act.

It is all a one-sided view of the case; for assuredly the insured will claim the insurance if the subject dies, but refuse payment if he lives. Since by such construction the life would have been insured without *paying anything* during the whole continuance of the war; and not only without paying, but without any obligation whatever to pay a cent or to do anything; but to abide the event, and, if it turned in his favor, take advantage of it, or, if otherwise, then be off from his contract, at his option.

A strange result of a rebellion—to give rebels greater rights, privileges and advantages than loyal citizens had during the same time, and even more, to give them such rights, privileges and advantages as they themselves did not before possess. In other words, the war conferred an advantage on rebels in the contract of life insurance.

Is this just reasoning, or a logical consequence of a war, that it confers *new* rights on the enemy?

To add greatly to the injustice, consider that it is not only conferring *new rights* (not contracted for) on the enemy, but it is *wronging* all loyal citizens in any manner connected with the Plaintiff in error, by damaging that body itself, and subjecting it to liabilities never contracted for, never contemplated by either party to the true and original contract, and deranging its finan-

cial calculations by making it liable without any payment of any money whatever during the whole war, for all the risks assumed upon the faith of a punctual payment of the premiums by all.

If all paid even at the end of the war, with interest, perhaps the whole calculation might be the same, and the payments based on an average duration of life fairly balance the risks assumed. But here lies the difficulty; those pay who choose, and others don't.

All who die during the war will claim. The *short lives* come on the Company after a few payments; the *long ones* never pay, because they have been insured during the whole war for nothing, and it is cheaper to be re-insured elsewhere than pay up back premiums and continue in the same Company. Look at the results in case of a long war, and the extreme injustice of the case is too plain to admit of a doubt, as to the practical consequences which will ensue. It must greatly injure the companies insuring by depriving them of the whole sum of the premiums accruing during the war, which those who survive the war elect not to pay, and yet holding them for *all* the lives departed during the war.

The point that the premiums were *a debt* is the *peculiar error* in White's case, (Grattan's Reports,) and the same error has been made in other cases.

To *decide* that the postponement of a mere right of election is a right of a *would-be debtor* resulting from war, is to completely reverse the purpose of the principle that a creditor's right to collect a debt is merely suspended.

This is fully argued out in Tait's case by Judge Emmons; the record of which remains in this Court, and see 4 Bigelow Insurance Reports, page 479.

That such was *not the contract*, not the intention, not contemplated, and so cannot be imported into the contract as one of its implied terms, is well shown in—

Worthington *vs.* Charter Oak Ins. Co., 41 Conn. Reports, 372.

See also Dillard *vs* Manhattan, 44 Georgia, 119.

In Clopton *vs.* The New York Life Insurance, 7 Bush., 279, we read: "Between a single act and such periodical acts there is no appreciable difference in reason or principle."

This is a fallacy, because it assumes that *the election has already been made* to pay the future premiums. In other words, it assumes these future premiums to be *debts;* just as in White's case, 4 Bigelow, 477, it is said, "White's right to pay, and the Company's right to collect the premium, were suspended during

the war, but immediately revived when peace was restored." The error here is that the Company *never had* a right to collect the premium: it is *no debt*. The insured may pay or not when the war is over. Similar fallacious reasoning is contained in Sands *vs.* New York Life Ins. Co., 50 N. Y. "*The debt* is suspended until peace returns. It is not destroyed."

The illustration there by reference to sale of a farm to be paid for by instalments is equally erroneous.

In Brigham *vs.* Townsend, 4 Jan., 1876, Supreme Court, Mass. *held:*

In a suit at common law, and in a case of mutual and dependent stipulations, where the Plaintiff is himself unable to fully and literally carry out the contract on his part, he cannot compel the Defendant to accept an equivalent, and it is for him, and not for the Court to decide whether a proposed indemnity is satisfactory.

1 Law and Equity Reporter, 223, for 15th March, 1876.

Fifth Point.

In any event, if there exists a strong indisposition to let the war *destroy* a contract originally valid, so far as to *forfeit* all the rights of the insured under it, simply because he cannot continue to perform this contract, by reason of the impossibility of paying or even giving notice of his intention to do so, and *without his fault;* then let the balance of justice hang even, and do not construe an impossibility of paying at the time and in the manner intended, into a *right to pay*, or *not to pay* at some future indefinite period, as he *chooses;* and so change the contract and extend the limit of the time for exercise of a mere right of election, and give the insured *the advantage* of acting as circumstances may show, will be for his interest; but with no certainty as to what that extension of a privilege will lead to, and all to the *disadvantage* of the Company.

If there should be *no forfeiture*, then at least there should be no *extension of a privilege.*

This *extension* is no part of the contract, and it works gross injustice.

In the case of Gray *vs.* Sims, 3 Washington Circuit Court Reports, pa. 276, Justice Washington says: "If the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, *the parties are both discharged*, from

its obligations. The insured loses his indemnity, and the insurer his premiums."

In like manner—In Railroad *vs.* Richmond, 19 Wallace, 589, *held.*—"Contracts, valid when made, continue valid, and capable of enforcement so long at least as peace lasts between the governments of the contracting parties."

In Goldsborough *vs.* Orr, 8 Wheaton, 217, *held:* that stipulations to be performed at different times, are *independent* of each other. Upon this ground it would seem that a separation might be made of the contract, into two parts, viz. First, what had been already executed and second, what could not be further executed.

If the excuse of non-performance from impossibility, or the doctrine of a quasi partnership, dissolved by war, saves the contract to any extent, it goes no further than to make valid, what has been done and to excuse the rest. Duer on Insurance, vol. 1, pa. 478, says: "A vested right, under a subsisting contract, is not affected by a subsequent war; but when the contract is executory, and would have been illegal, if made in time of war, it becomes so from the time that hostilities commence, as to all acts to be performed by either party during the war."

In Hanger *vs.* Abbott, 6 Wall., 532, *held:* that "executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war."

This contract is *partly executed* and *partly executory;* then let that part which has been executed, *stand good,* so that there shall be *no forfeiture;* but let the rest be declared to be *incapable of execution;* so that to use the language of the policy itself, it *ceases* and *determines.*

The language of Lord Ellenborough, in Want *vs.* Blunt, 12 East. 183, deserves notice, viz:

"This is in substance a contract to insure quarterly, and every time the insured elects to pay a premium, at the end of the quarter, he elects to enter into a new contract, because he was under no obligation to pay the premium, and the other party was under no obligation to pay the loss unless the premium was paid; therefore when he comes in with his election, and offers the premium, and the other party accepts it, their minds have met on this new subject of the insurance for that following quarter, and it is as much a new and additional contract as it was in its inception."

IN THE

Supreme Court of the United States,

October Term, 1875. No. 213.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error.

vs.

HENRIETTA HENDREN.

In Error to the Supreme Court of Appeals of the State of Virginia.

BRIEF FOR THE DEFENDANT IN ERROR.

EVIDENCE.

A good deal of important evidence has been omitted from the statement of facts in plaintiff's brief, which will be referred to by the defendant, through her argument, as its application requires.

POINTS.

I. No federal question is sufficiently presented in the case.

II. No federal question is involved or decided.

III. If there be a federal question decided, it is correctly decided.

IV. If there be a federal question presented and incorrectly decided, its decision was not necessary to the judgment rendered, and there is other matter in the case broad enough to maintain the judgment.

I. If there be a federal question in this case, it is not sufficiently presented.

Throughout the entire Record there is not to be found the mention of, or any reference to, any clause of the Constitution, any Act of Congress, or any Statute of the State of Virginia, nor was the construction of any Act of Congress argued by counsel, or supposed by counsel or Court to be involved in the case.

The 7th plea and the several instructions asked, present nothing but the general question, arising under public law, of the effect of war upon the policy and agency. The date of the President's proclamation, August 16th, 1861, in the 7th plea and 16th instruction, was taken by plaintiff in error, simply that it might have a date for the beginning of the war clearly within the period of its commencement, and was taken because it was the later date fixed by the minority of this Court in "The Hiawatha," 2 Black, 695, 698, and therefore, beyond all possible reconsideration, was a date to rely on. It was not given, or used, to draw in question the terms of that proclamation, or of the Act under which it was issued, but only because (in the language of plaintiff's brief before the State Court,) that proclamation "was the first formal recognition of war in Virginia." [The opinion of this Court in "The Protector," 12 Wall., 700, fixing the 27th April, 1861 as the beginning of the war in Virginia, had not then been delivered.]

The plaintiff in error, to show the presentation of the federal question in this case, relies upon this plea and the use of the term "license" in the 16th and 17th instructions asked, (the 17th and 10th are identical, and the Court of Appeals of Virginia held that the 16th was immaterial to the right of action and expressed no opinion on it.)

It is now said that the 16th and 17th instructions import a reference to the Act of July 13th, 1861.

They are, viz:

INSTRUCTION No. 16.

"That in legal contemplation a war existed between the United States and the Confederate States, from the 16th August, 1861, until after the year 1864; that a corporation, incorporated by the State of New York, must, for the purpose of this suit, be considered a citizen of the United States, and a citizen and resident of the State of Virginia, during the late war must be considered a citizen of the Confederate States; that no commercial intercourse was lawful between any of the citizens of the United States and any of the citizens of the Confederate States during the war between them without license of the Governments of those States respectively, and there being no evidence of any such license in this case, the jury cannot presume that Vaughn did transmit the premiums on policy of insurance given in evidence, or in any manner account for them to the defendant, without positive evidence of that fact."

INSTRUCTION No. 17.

"That during the war the defendant itself could have no kind of business communication or intercourse with the plaintiff in the Confederate lines, unless specially licensed thereto by the United States Government; and that the defendant could not do by an agent what it could not do by itself."

In its brief, on motion to dismiss, page 5, following the citation of these instructions, plaintiff in error says, viz:

"In this case the construction of the Acts relating to license for intercourse during the war, were distinctly drawn in question by the instructions asked; *they could have meant nothing else.*"

It is submitted that it is not morally possible for the plaintiff in error to have had the Act of July, 1861, in contemplation, without making some more specific reference to it, somewhere throughout the Record, than is to be found in the 7th plea, and these two prayers. But the language of these two prayers makes it very plain that they referred to the license to trade, which is a feature of public law, and not to the license provided for by the Act of Congress.

(1.) The basis of the 16th is, "that *in legal contemplation*, a war existed,"&c, and *therefore* commercial intercourse was unlawful. Its unlawfulness is not placed upon its prohibition by Act of Congress. (2.) The 17th instruction says that the defendant (below) could have had no intercourse with the plaintiff (below) "unless specially licensed thereto *by the United States Government*." Under the terms of the Act of Congress, the license was to be given *by the President*, and by him alone, (The Ouachita Cotton, 6 Wall., 521,) and not by the "United States Government." (3.) According to the terms of the 16th instruction the license referred to, was such a license as might have been given by either the United States Government, *or that of the Confederate States*, and necessarily could not have been the license provided for by the Non-intercourse Act. (4.) The 16th instruction states, as law, "that no commercial intercourse was lawful between any of the citizens of the United States and any of the citizens of the Confederate States *during the war* between them,"&c.; and "during the war," is the period of non-intercourse also fixed by the 17th. These instructions were in direct contravention of the Act of July, 1861. That Act recognized the principle of non-intercourse, incident to public law. But it did not enlarge or extend its interdictions; on the contrary it modified and diminished them.

McKee vs. United States, 8 Wall. 166.
United States vs. Grossmayer, 9 Wall. 74.
Hamilton vs. Dillin, 21 Wall., 73.
Allen vs. Russell, 3 A. L. R., (N. S.) 362.

Under public law, commercial intercourse with the citizens of those States, which constituted the Confederate States Government, would have been unlawful for the whole period "during the war," but not so under the Act of Congress. Under its modifications, and as defined by the Proclamation of the President, the lawfulness of intercourse was in fact extended to a large portion of the territory of States declared to be in insurrection, and might have been re-established by the President, in sections and in States, as rapidly as the forces of the United States occupied the hostile territory.

It is thus clear that neither the 7th plea nor the 16th or 17th instructions asked for could have referred to the Act of Congress. It is not pretended that any more specific reference to it can be found anywhere else in the Record.

Nor is there any reference throughout the Record to any Statute of the State of Virginia.

Nor is there any reference in the opinion of the Court of Appeals of Virginia to any Act of Congress; and the only mention made of the Virginia Statute is in connection with the proposition of the plaintiff in error, (17th instruction, Record page 55,) that the "defendant (below) could not do by an agent what it could not do by itself." This proposition was held to be bad because unintelligible, since a corporation cannot act at all "by itself," but always must act through agents.

In further discussing the error of this instruction, and surmising its intention, the Court, by way of illustration, merely, showed that e. g., a foreign insurance company could not, through an agent of New York, make or renew a policy in Virginia, while through an agent in Virginia it might do so.

The language cited from the Court's opinion in the plaintiff's brief, on page 17, viz: "The company was bound to keep an agent here continuously to receive premiums and to pay policies," was not used in reference to the Virginia Statute, but in construction of the contract, from the view taken of its *locus*, as will be shown more fully hereafter.

With the exception of this reference to the Virginia Statute, in which it is introduced merely in aid of an illustration of the Court's reasoning upon a prayer, objectionable independent of the Statute, there is neither in the Record or opinion any mention of, or reference to, any Act of Congress, or any Statute of Virginia.

It is, therefore, submitted that no federal question is sufficiently presented in the case.

Lawler vs. Lawler, 14 How., 152.
Messenger vs. Mason, 10 Wallace, 507.
Parmlee vs. Lawrence, 11 Wall., 36.
Ocean Ins. Co. vs. Polleys, 13 Pet. 157.

II. No federal question is involved or decided in the case. [That it must be, see Bolling vs. Lersner, Dec. T. 1875, and Murdock vs. Memphis, 20 Wall., 590.]

(*a.*) The Court of Appeals of Virginia decided that the war did not annul the policy; that the failure to supply its agent with formal receipts, was a withdrawal of his agency; that the policy of insurance was a Virginia contract, and under its terms the Company was bound to keep an agent in Virginia; that not having done so, and the failure to make payment to a legally constituted agent, having arisen from such default on the part of the Company, such failure did not avoid the policy.

The language of the Court on this point is found on Record, p. 54, viz: "It is also of opinion that the declaratons and admissions of R. H. Vaughn, as testified to by Mrs. Hendren, tending to prove his agency, or the payment of premiums during the war, as set out in the second Bill of Exceptions, are not necessary to support the verdict or the plaintiff's right of action; the evidence in the Record, exclusive of the declarations and admissions of Vaughn, showing that the verdict is not excessive, and the payment of premiums *flagrante bello* not being essential to the plaintiff's right of action. The Company was bound to keep an agent here continuously, to receive premiums and to pay policies. It would be unreasonable and unjust to hold the insured to a forfeiture of his contract and of the money he had paid on account of premiums, because he did not pay premiums which he could not pay, because of the failure of the Company to have an agent here *as bound by its contract*, authorized to receive them. If the Company was excused for the non-compliance with its contract in this particular, surely the insured would be excused for the non-payment, and could not be held to a forfeiture therefor."

(The Court had examined the question in Warwick's case, 20 Gratt. 614, and there decided, on the authority of Paul vs. Virginia, 8 Wall, 168; Daniels vs. Hudson R. Fire Ins., 12 Cush, 417, and Fant vs. Miller, 17 Gratt., 47, that such a policy as this was a Virginia contract.)

The Court further held that the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 11th, 14th, 15th, 16th, 18th, 19th, 20th and

21st instructions asked for by plaintiff in error, were immaterial, and passed no opinion on them. The 16th, in which it is claimed the federal question was presented, was also held to be immaterial, and no opinion expressed on it. The 13th instruction, to the effect that the plaintiff below was a "partner" in said Company, and that her rights in said Company "were revoked by the declaration of war," was held to be not law. The 22d and 23d instructions raised the question of whether Hendren's service as a clerk in the adjutant general's office, was "entering into military service" or not. And the 12th instruction *was granted.*—Record, pp. 38 and 55.

The prayer of the plaintiff below asserted no proposition relating to the war.

There is thus far nothing left, wherein to find the necessary federal question, but the 7th plea and 17th, (a duplicate of the 10th,) 12th and 13th instructions, (the 13th stating that Mrs. Hendren was a partner,) and the opinion of the Court. The 7th plea involved no federal question; the 13th instruction involved none, and incorrectly stated the law; nor did the 17th instruction, unless its being in contravention of the Act of Congress, presented it; and if this be so, the *plaintiff in error* is claiming adversely to the Act; and the 12th instruction involved no federal question, and if it did, it *was granted.*

So that there is now nothing left wherein to find the federal question except the Court's opinion. Indeed, the plaintiff here concedes in its brief, p. 5, that the opinion of the State Court was based "upon the single fact * * that there was no agent to receive payment of premiums in any manner." It is claimed by plaintiff that the State Court decided that, *under the Statute of Virginia*, there ought to have been such agent in the State. It is submitted that the Court did not so decide on *the Statute.*

The facts surrounding the transaction: the policy having been negotiated through Ferguson, the agent at Norfolk, Rec. p. 24, its having been transmitted by the Company to Ferguson, and not operative until delivered by him, the premiums having been expressly payable "at the agency" of Vaughn or Ferguson, Record, p. 16; the notices of premiums due coming from the Virginia agent, and the receipts bearing the inscription,

"not valid unless countersigned by" the agent, pp. 16 and 19: all these circumstances defined it as a contract to be performed in the State of Virginia, and so the Court held it to be.

The *locus* of the contract was thus enough to make it obligatory upon the Company to keep an agent in Virginia, even had the Statute in question never existed. The Statute, however, having been then in force, and the contract of insurance having been made in reference to it, its terms became a part of the contract, and it is submitted, would have continued to be the law of the policy, in respect to the place of performance, even had the Statute been thereafter repealed.

In considering the Statute in question, and referring to all policies issued during its operation, this Court says, in Paul vs. Virginia, *supra*: "The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are then local transactions, and are governed by the local law."

And it was in construing this policy, in reference to its *locus*, that the State Court decided that it was a "local transaction," and that the Company was required to keep an agent in Virginia, "as bound *by its contract*, authorized to receive" payment of premiums. When the Court, in the consideration of the 17th instruction, says the premiums are, "by the contract *and the Statute*, to be paid to the agent, it is not construing the Statute, but only using it by way of illustration, to give an instance in which the Company *could* "do by an agent, what it could not do by itself," assuming that "by itself" the plaintiff in error meant "by its officers or agents of New York," e. g., make a contract in Virginia.

(*b.*) Whether by the operation of the Statute, in force when the policy was issued, the terms of the Statute *became part of the contract*, is one question, but the operation of the Statute, *as a Statute*, and as imposing duties independent of the contract, is altogether a distinct question.

Even had the latter been involved and decided, it was not a federal question, for there was nothing in the Statute repugnant to the Act of July 13th, 1861, nor was this Act of Congress drawn in question.

The Act of Congress provided that, in the contingency mentioned, the President, by proclamation might declare that

the inhabitants of certain States, or sections, or parts thereof, were in a state of insurrection, and "thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same or conveying persons to or from such State or section, be forfeited to the United States; provided, however, that the President may in his discretion license and permit commercial intercourse," &c.

Assuming, at this stage of the argument, that the prohibition of commercial intercourse under the Act of Congress was as broad as the interdiction under public law, and not limited by the specifications in the Act, it still, in its prohibitory features, only recognized and gave notice to the country of a principle of public law.

The chief feature of this Act, made more manifest by the amendments and proclamations and orders of the President (enumerated in Hamilton's case, 21 Wall., 73, *post*,) which followed it, was to mitigate the rigorous interdictions of public law, and to provide for a limited commercial intercourse with the enemy.

McKee vs. United States, 8 Wall., 163.
United States vs. Grossmayer, 9 Ib., 72.
Hamilton vs. Dillin, 21 Ib., 73.
Allen vs. Russell, 3 A. L. R. (N. S.) 362.

In McKee's case, the Court says: "It is a familiar principle of public law, that unlicensed business intercourse with an enemy during a time of war, is not permitted. Congress, therefore, in recognition of this principle, when it declared, on the 13th day of July, 1861, that commercial intercourse between the seceding States and the rest of the United States, should cease and be unlawful, after the proclamation of the President, that a state of insurrection existed, authorized the President, in his discretion, to license trade."

In Grossmayer's case, the Court says: "It has been found necessary as soon as war is commenced, that business intercourse should cease between the citizens of the respective parties engaged in it, and this necessity is so great that all writers on public law agree that it is unlawful, without any express declaration of the sovereign on the subject. But Congress did not wish to leave any one in ignorance of the effect of war in this regard, for as early as the 13th of June, (July,) 1861 it passed a Non-intercourse Act, which prohibited all commercial intercourse between the States in insurrection and the rest of the United States. It is true the President could allow a restricted trade, if he thought proper, but in so far as he did allow it, it had to be conducted according to regulations prescribed by the Secretary of the Treasury."

It was not the intention of this Act, or of any Acts of Congress, that all questions arising out of the war should be determined by the municipal law, instead of by the rules and doctrines of public law, unless in cases where the latter might have been modified. The principles of public law have been always applied by this Court to questions arising under the late war, unless such questions came within the exception mentioned.

The Prize Cases, 2 Black, 635.
The Venice, 2 Wall, 258.
The Hampton, 5 Wall., 372.
The Ouachita Cotton, 6 Ib., 542.
Hanger vs. Abbott, 6 Wall., 532.
Ward vs. Smith, 7 Wall., 447.
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The opposite view would make this Court the Court of ultimate review of every case throughout the whole country, which might involve any question arising out of the war.

But, whether public or municipal law be applied, there was nothing in the Virginia Statute (Acts of 1856 and 1857, codified on page 240 of the Code of 1860, and in force when this policy

was issued. Plaintiff's brief, page 5,) repugnant to either. There was nothing in this Statute which required or declared that commercial intercourse during the war *should* be lawful. This law provided that no foreign company should make any contract of insurance in Virginia, except through a resident agent, who should be appointed under a letter of attorney, which should be filed with the auditor of the commonwealth, and that such an agent should be constantly kept in the State, while any liability remained outstanding on any contract of insurance, and that such power of attorney appointing said agent should not be revoked until after a like power had been given to some other competent person.

The terms of this Statute required no intercourse during the war between the insured, or assured, and the company. One manifest purpose of the Statute was to do away with the necessity of any intercourse with the company *at all times*, except through the Virginia agent, and for the security of the citizens of that State, to require all foreign insurance companies to keep a representative established there, as the condition upon which they should enjoy the privilege and profit of transacting business within its limits.

Under the terms of this Statute, which was then in force, as well as under the terms and construction of the contract, irrespective of the Statute, such agent ought to have been, and in fact was, in Virginia when the war began, and so remained. Even had the Court of Appeals passed upon the question, and held that the war did not annul the agency, there would have been nothing in such decision (or in this Statute, if their decision had rested on its construction) repugnant to the Act of Congress, or to public law, because paying premiums to the agent involved no intercourse with the principal.

The validity of this Statute, in respect to the Constitution of the United States, was affirmed by this Court in Paul vs. Virginia, 8 Wall., 168.

(c.) The Act of July 13th, 1861, is limited in its operation by its specifications, and does not prohibit any other "commercial intercourse," or trade in any other articles, or contracts in reference to any other matters, or intercourse of any other sort, than as enumerated and specified in the Act. A policy of life

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Under the terms of this Statute, which was then in force, as well as under the terms and construction of the contract, irrespective of the Statute, such agent ought to have been, and in fact was, in Virginia when the war began, and so remained. Even had the Court of Appeals passed upon the question, and held that the war did not annul the agency, there would have been nothing in such decision (or in this Statute, if their decision had rested on its construction) repugnant to the Act of Congress, or to public law, because paying premiums to the agent involved no intercourse with the principal.

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insurance is not within the operation of the Act, and for the law and effect of non-intercourse, in all matters outside the limited operation of the Act of Congress, at least, the Court must necessarily look to the principles of public law, and no federal question is involved in them.

Allen vs. Russell, 3 A. L. R., (N. S) 361.

In Paul vs. Virginia, 8 Wall., 183, (supra) the Court is speaking of a fire policy, between which and a life policy there are very broad distinctions, but in so far as the nature of the transaction of issuing, and as to whether either would be within a prohibition of "commercial" intercourse, the language of the Court is equally applicable, viz :

"There is, therefore, nothing in the fact that the insurance companies of New York are corporations, to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not inter-state transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia, by a citizen of New York whilst in Virginia, would constitute a portion of such commerce."

(*d*) Whether a policy of life insurance was annulled by the intervention of war, as being then "against public policy," (as claimed by the plaintiff to have been) is not a federal ques-

tion. The question of jurisdiction is not determined by any considerations of "public policy."

III. If there be a federal question involved and decided in this case, it is correctly decided.

(1.) If such federal question be in the case, it can only be because the Act of July 13th, 1861, is indirectly included in the submission of some general proposition of public law. If it can be looked for in such manner, then it is most clearly presented in the 12th instruction asked by the plaintiff in error, *which was granted* Record, page 38. The interdiction upon commercial intercourse could not have been more broadly stated, or more liberally sustained, than it was by the granting of that prayer. If the federal question be in the 17th instruction, it was correctly decided, because the instruction was in contravention of the Act of Congress, and was rejected.

(2.) The war did not operate to annul or suspend this contract of life insurance, nor to annul or suspend the agency of the company in Virginia.

Hanger vs. Abbot, 6 Wall. 532.
Ward vs. Smith, 7 Wall. 447.
United States vs. Grossmayer, 9 Wall. 72.
Robinson vs. International, 42 N. Y. 54.
Bernheimer vs. United States, 5 Ct. of Cl. 549.
Manhattan Life Ins. Co. vs. Warwick, 20 Gratt. 614.
Sands vs. N. Y. Life Ins. Co. 50 N. Y. 626.
Cohen vs. New York Mutual Life Ins. Co. 50 N. Y. 610.
New York Life Ins. Co. vs. Clopton, 7 Bush, 179.
Statham vs. N. Y. Life Ins. Co., 45 Miss. 561.
Hamilton vs. New York Mutual Life Ins. Co., 9 Blatchford, 334.
Hillyard vs. Mutual Benefit Ins. Co., 35 N. J., 415, (Sup. Court.) Affirmed in Mutual Benefit Ins. Co. vs. Hillyard, 37 N. J., 444, (Court of Errors and Appeal.)
Kershaw vs. Kelley, 100 Mass., 561.
Phillips vs. Hatch, 1 Dillon, 571.
Worthington vs. Charter Oak, 41 Conn. 372.
Dennison vs. Imbric, 3 Wash. Ct. Ct. 396.

Waddington vs. Griswald, 16 John. 438.
Conn. vs. Penn., 1 Pet. C. C. 496.
Buchanan vs. Curry, 19 John. 137.

(3.) *Duty of the Agent when the war intervened.*

Vaughn was agent when the war began. He was then simply in the position of an agent, temporarily unable to communicate with his principal.

At that time the prevailing opinion was that the war would be of very brief duration, and even when discovered that it was not to be a matter of a few weeks only, the public anticipation was that it nevertheless would not be protracted. In that situation, what was Vaughn's duty to his principal? The business of his principal was to procure contracts of insurance, and to retain all it procured. These policies were the source of its revenue. Its profits were in procuring and retaining as many as possible. While Vaughn, therefore, after the war began, could not make any new policies, his very plain duty to his principal was to retain as many of the old ones as possible. The plaintiff in error, (with great respect for its argument,) argues this case as if a policy of insurance were a contract, which the company no sooner executed, than it should seek to avoid it; as if it were a snare, from which the company should always struggle to escape, as if the policy, instead of being in its execution and maintenance, a contract of reciprocal considerations and mutual benefit, was one in the interest of the assured alone.

In the general effort to retain the policies under his special charge, Vaughn was simply discharging a plain duty to his principal. That he discharged it with discretion, and with a just regard to the rights of the company, is attested by the fact that he declined to receive the premium from Capt. J. B. Jones, because he (Jones) had gone into the army.—p. 26.

Story on Agency, sections 141, 193, 194, 237.

(4.) *Payment of Premiums.*

(Payment of premiums was a question of fact, which, if material, was found by the jury for the defendant in error. If the State Court was right in the view, that, under the company's default, payment was not essential to the right of action,

it need not be discussed. In no event can the defendant in error see how the question is open in this Court. It, nevertheless is argued by the plaintiff in error, and therefore the following is submitted on the point.)

(*a.*) Payment under agreement of agent.

Between the 25th February, 1861, and 25th May, 1861, there was the most express assurance made by Vaughn to the insured, to the effect that if at any time, he (Hendren) was unable to meet his premiums, he (Vaughn) would become personally responsible to the company and pay them, and individually look to the insured for re-imbursement. In pursuance of this undertaking, and as collateral for any amount in which Hendren might thereafter become indebted to him individually, on this account, he took from Mrs. Hendren her gold watch and chain, subsequently however returning the chain, because the retention of the watch was sufficient. If the fact of payment rested alone on this assurance and undertaking, it is submitted that it is sufficient.

See Sheldon vs. Conn. Mutual Life Ins. Co., 25 Conn., 207

Tyloe vs. Merchants Fire Ins. Co., 9 How, 390.

Bouton vs. Am. Mutual Life Ins. Co., 25 Conn., 542.

Cornell vs. LeRoy, 9 Wend., 163.

What premiums were paid by Vaughn for Hendren, and what were paid in the first instance by Hendren, it is now impossible to know, though Vaughn's agreement is broad enough for all. But as to such as may have been, thus, in fact, paid by Vaughn's making himself personally responsible to the company, in the event of Hendren's failure, his subsequent death, and failure to remit could not affect the rights of the assured.

Payment in effect by such assurances on the part of the agent, and by his becoming personally responsible to the company, is not ouly sustained by the authorities cited, but is sanctioned by the dealings of this plaintiff in error with its own agents, and by its express instructions to them.

The 8th special instruction by this plaintiff in error to its agents is, viz:—(p. 23.)

"Agents crediting premiums not actually received by them, do so at their own personal risk, and for which the company will not under any circumstances be responsible to remit the same upon their non-receipt by the agent."

Under this special instruction, then, what is the *status* of a policy, for the payment of the premium on which the agent has made himself responsible to the company, and also has, in fact, remitted out of his own means, if the assured fails to re-imburse the agent? The agent plainly has lost his money, but could the company keep the agent's money, and at the same time *forfeit the policy also?* The company therefore admits the sufficiency of a payment when the agent assumes a personal responsibility, and in fact, remits. If, now, the agent assume the responsibility, but fail to remit, could such failure affect the rights of the assured? The defendant submits not, because the duty of remittance is a matter between him and his principal, and the rights of the assured could not be impaired by the failure of the agent to account.

It is submitted therefore that this special instruction sanctions the undertaking of Vaughn. But, further, the premium of February 25th, 1858, was paid under precisely such an arrangement with Furguson—(p. 16,) and Furguson shows that such was his practice with others, to such an extent as that he now has on hand unpaid due bills to the extent of about $1000, taken for premiums personally assumed by him. He took the due bills "and charged himself in account with the company"—(p. 17.)

It was also shown by Ferguson that his course of dealing with the company was to settle monthly; that he kept his account with the policy holders on the one hand, and his account with the company on the other, striking a balance with the company once a month, and remitting by draft, but never sending the identical money received.

(*b.*) *Payment, in the first instance, by Hendren.*

It is submitted, not only that the company is thus estopped from denying payment, but that the evidence of actual payment is conclusive.

The testimony of Rev. Geo. F. Adams, shows that the President of the Company, in 1868, admitted payments up to within two or three months of Hendren's death, which was Aug. 15th 1862, [see pp. 17 & 43.] Whether this admission was founded on the receipt of funds, which Vaughn may have been able to transmit, notwithstanding the war, or on the President's rough calculation of the amount of dividends in hand, due Mrs. Hendren, does not appear.

The repeated representations made from time to time by Vaughn to Mrs. Hendren, the defendant in error, to Dr. Wm. R. Vaughn, to Miss Betty Vaughn, to Mrs. Levinia Vaughn, and to Capt. Jones, to the effect that the premiums would be paid, that they were being paid as they fell due, and successively afterwards that they had been paid, is competent evidence of the fact. These representations were made in response to inquiries from parties who were deeply interested in the matter, and who at the same time were ready to provide for the payment, if necessary. They were made to parties who, at the same time tendered their own means, in order that the policy should not expire. They were made to parties who instructed him not to let the policy expire without giving them notice, because they were ready to pay the premiums at any time, if Hendren needed assistance, and Vaughn promised them that he would notify them if necessary, having in his own possession for several months the sum of $600 belonging to one of them, which he was authorized so to apply—(p. 26.) They were made particularly, to the defendant in error, who inquired of Vaughn, as the agent of the company, in respect to a matter which deeply affected her interests, and her rights in regard to that company.

Vaughn, from time to time, as premiums became due, assured her and her friends, who came as it were with money in their hands, to be used for the purpose, if necessary, that the premiums were paid. These representations were all made by Vaughn in the course of his employment as agent, and in reference to a matter completely within the scope of his agency; in reference to a matter, more than any other, expressly within his agency, i. e. the payment of premiums, about which it was especially his duty to be informed, and to inform correctly those

who had a right to inquire. If it were possible now to ascertain the fact, and it could be made to appear that in fact these premiums were not paid, at the different times when Vaughn represented that they were paid, then it is clear from the evidence that the only reason why they were not paid, was because of these representations by Vaughn. These premiums, then, were paid, or Vaughn's representations were not true.

The question, therefore, is not one of "*res gestae*," or "*dum ferret opus*," but whether or not the plaintiff in error could shield itself behind the alleged untruthfulness of its own agent's representations, on a matter especially within his employment, and thus perpetrate a glaring fraud on the assured?

If the premiums were not paid, the representations of the plaintiff in error, through its agent, prevented their payment. If this defendant in error was deceived in the belief that the premiums were paid, the plaintiff in error, through its agent, deceived her. She was induced to believe that these premiums were being regularly paid by the representations of this company's agent. She acted upon this belief, and the company is concluded from denying the truthfulness of its own statements.

See 37 How. Pr., 126, Baker vs. Am. Life Ins. Co.
Lightbody vs. N. Am. Ins. Co., 23 Wend., 12.

Such a defense, it is submitted, cannot be maintained. There is nothing in these representations which the strictest principles of evidence would exclude, unless it be the single statement made *after Hendren's death*. This was unimportant, and no special point was made upon it.

It is further in evidence that in January 1862, Capt. Jones loaned money to Hendren, for the purpose, as he understood, of paying his premiums.—(p. 26.)

(c.) *Payment by dividends.*

It is further in evidence that the plaintiff in error, from May 25th, 1861, up to Hendren's death, (and as much later as this Record goes) held an amount of dividends due the assured more than sufficient to meet all premiums. From the beginning of the second year, Mrs. Hendren was entitled to dividends. These dividends during the time covered by this policy, were

never less than 30 per cent., (amounting to $36.00 *per annum*,) and had been as high as 40 and 50 per cent.—(p. 24.)

Up to Hendren's death, the assured was therefore entitled (less ten days,) to five years' dividends, making $180.00—adding four, three, two and one year's interest, respectively, the total in the hands of the company due Mrs. Hendren, at the death of her husband, was $201.60. The disputed premiums are only five, amounting to $150.00.

(5.) *The evidence of payment.*

It was not necessary that the payment of premiums should be vouched by any special form of receipt. The words on the margin of the policy, viz: "all receipts for premiums paid at agencies are to be signed by the president or actuary," are not part of the contract. If part of the contract, they are in direct conflict with, and must be made subordinate to the express provision in the policy, that it is made on the consideration of the annual premium "*to be paid*" quarterly, etc., and the condition that it is to be forfeited if the said Mrs. Henrietta Hendren "*shall not pay*" the said premiums. The only condition of the policy in this connection is *payment*. *How to show payment* is only a matter of evidence. If the *fact* be established the party need not have any receipt at all. Suppose a policy holder to tender payment, and the agent refuse to accept? or the policy holder to pay, and the agent fail or decline to give this particular form of recept? or the company should withhold, or accident happen in the transmission of these special receipts? In any such event the rights of the assured certainly could not be affected, and yet they would be, if the appellant's argument be good.

But if such receipts are necessary at the agency, the company is *bound to have them there*. Any exigency that will excuse the company for *not* having them there, will, at the same time, excuse the agent and the assured for acting without them.

It is further submitted, that if the plaintiff in error did not act with sufficient foresight in respect to the contingency of war, and provide its agent with a sufficient number of these receipts in advance, to last through the period of the *then probable* non-intercourse, and the agent thus found himself without them, and without the means of procuring them, his duty to his

principal was to make the best substitute possible, and act in the emergency as best he could.

See Story on Agency, secs. 141, 193, 194, 237.

He certainly had no warrant to assume, that, instead of its still being to the interest of his principal to maintain its policies, and receive revenue from them, there was a change in its position, and that its interest *now* lay in avoiding contracts, and refusing revenue, at least, so far as its southern policy holders were concerned.

(6.) *"General" and "local" agents, and the scope of Vaughn's agency.*

[The character of the agency is noticed by the defendant only because plaintiff introduces it; not that any question on the point is thought to be open in this Court.]

There is no distinction in law between "general" and "local" insurance agents, in respect to their powers. Those terms are peculiar to the insurance business, and the law has never accepted them. In insurance terms they may mean different things, and may indicate the territorial province of an agent, but, in law, the character and powers of the agent are determined by his authority, and are not interpreted by the territorial terms of "general" and "local." The law distinguishes only between "general" and "special" agents, and the fallacy consists in giving to the term "general" in one connection, a meaning which it has only when used in another.

Whatever, as between them and their companies, may be the *territorial* distinctions between "general" and "local" agents, both are, in respect to their duties and powers, "general" agents in the sense in which the law uses the term. Neither Ferguson no Vaughn ever had anything to do with the "general" agent at Richmond, nor were they in any way subordinate to him.

They communicated directly with the corporation, and represented it just as fully in respect to the policies under their charge, as did the agent at Richmond in respect to the policy. holders there.

Whether there were any territoral limits to the agency of Vaughn or not, it does not appear that knowledge of any such

fact was ever brought home to Hendren or the assured. And, if in fact, there were, it is submitted that such limits were only a matter of convenience, prescribed by the company with a view to the capacity of any agency for working up any given field, and to keep different agencies from trespassing upon each other's profits.

The notices sent to Hendren had endorsed on them, either "payable at the agency of R. H. Vaughn," as on page 16, or "not valid unless countersigned" by Vaughn or Ferguson, p. 16, or "R. H. Vaughn, agent," as on page 19. These terms indicate a "general" agency in law, whether, as to the company, he was "local" or not, and could not be taken to mean that the party who received the company's notice to *pay to R. H. Vaughn*, must understand that, as soon as Vaughn stept over a certain geographical line, he had no power to receive payment. Such territorial limitations at most, if brought home, could be taken to mean, only that Vaughn's agency was limited to such policies as might, by the company, be classified as belonging to a particular district; and, as to such policies, wherever Vaughn or the insured, might be, the one had authority to receive and the other the right to make payment.

Lightbody vs. North Am. Ins. Co., 23 Wend., 18.

(7.) *Military service of the agent Vaughn.*

The fact that Vaughn entered the confederate army did not annul his agency, and could not impair the rights of the assured. Such service might have diminished his efficiency as an agent, but so far as he was able and continued to discharge his duties as such, there was nothing in his military service incompatible with his duties as agent. Ferguson did the same thing, and the company ratified all his acts. Ferguson went into the military service April 19th, 1861, and continued until May, 1862, (p. 23,) and during the whole period acted as agent, receiving premiums, and giving out the special receipts as long as they lasted, and then substituting his own conditional receipts, (see page 22 and the company's account with him, pp. 48-50,) and the company confirmed his acts, (pages 21-23 and account, page 48.)

As soon as communication was restored the company opened correspondence with Ferguson, as its agent, to know the condition of its "Norfolk business."

If the war annulled his agency, and annulled the policies in his charge, then their own books, under date of April 27th, 1861, would have shown precisely the condition of their "Norfolk business," for no change could have transpired in it after that date, i. e., the beginning of the war. But it is evident that the company's correspondence refers to what may have transpired in the interval, of which it was ignorant. And in confirmation of this, Bloss comes on to Norfolk, settles the business of the intervening period, and receives from Ferguson the funds due the company. And, at the close of the war, not knowing of his death, the company attempted to open just such a correspondence with Vaughn, (p. 26,) and the fact of Vaughn's agency during 1861 and 1862 is admitted in the 17th Interrogatory, on page 29.

The evidence, and this account in particular, shows, not only that this company did not regard its agencies as annulled by the war, but that it did not regard *its policies* as annulled or suspended by the war. The premium of W. P. Griffith appears to have been paid May 26th, 1861, (*after the war began,*) and the loss was recognized *and paid* July, 1862, (p. 50, p. 22, and p. 21.)

In Worrell's case it does not appear clearly when the premiums were paid, but the company's letter of July 10th, 1862, p. 21, just after communication was opened, was written to inquire *how much had been paid on the policy.* That must have meant, how much *had been paid to Ferguson* after the war began, or else its own books would have given the information. In J. M. Smith's case the annual premium was paid March 28th, 1861, and it was conceded by the company that his policy continued *after the war began* up to the time of his death, notice of which was given November 18th, 1861, and the loss paid January 30th, 1862, (see page 48.)

(8.) *Policy was a Virginia contract, and it was the duty of the company to keep an agent there.*

If Vaughn did not continue to be the company's agent, then it had none with whom Hendren could deal. If so, that was a default of the company's, of which it cannot avail. The law of Virginia in respect to foreign corporations, the circumstances of the execution of the contract, the situation of the parties, and the course of dealing on the part of the company, show that the policy was a contract which on Hendren's part was to be executed in Virginia, and that it was part of that contract, that he should have the facilities, i. e. an agency, for executing his part of it in that state. If anything more were needed to put this point beyond question, it is found in the notice sent to Hendren, by the Actuary, of the maturity of his August premium for 1860, dated in New York, but *directing him that his premium was "payable at the agency of R. H. Vaughn."* (p. 16.)

Paul vs. Virginia, 8 Wall., 168.
Daniels vs. Hudson River Co., 12 Cush., 417.
Fant vs. Miller, 17 Gratt., 47.
Warwick vs. Manhattan, 20 Ib. 614.
2 Parsons on Contracts, sec. 583, sec. 587.

(9.) But if the payments to Vaughn were not good, or even if no payments at all had been made, the right of the assured to recover would not be impaired, if the company failed to provide a proper agency. The company could not deprive the assured of the power of payment, and then take advantage of the failure to pay.

It might be granted that Vaughn ceased to be agent, that no payment of premium was made after the war began, and that no estoppel exists, but still the assured's right of recovery would remain, if it appeared that Hendren was prepared to pay his premiums, and failed to do so, only because there was no agent to receive them. It was the duty of the company, under its contract, to have an agent there. In the circumstance of the war, the company may find an excuse sufficient to relieve it from the imputation of a deliberate breach, but it could not make its own default the ground of forfeiture. It could not claim the

benefit of a forfeiture, if the failure to pay resulted from its own breach. It could not assert that the policy lapsed because of a failure to pay, if its own dereliction brought about the failure. It could not be permitted to find an excuse for itself, and hold Hendren to a performance, which its own act made impossible. This would be to let it profit by its own clear wrong.

See authorities *supra*.

(10.) *The rights of the assured are not affected by the fact that the company was a mutual one.*

Though the plaintiff in error may have been a mutual company, the intervention of war did not, on that account, affect or "revoke" the rights of the assured.

The fact that a corporation may be organized on the mutual plan, does not constitute it a "partnership," subject to dissolution by the event of war, or in any way affect the character of the contract.

See Cohen's Case, 50 N. Y., supra.
See Sand's Case, 50 N. Y., supra.
See Hamilton's Case, 9 Blatch., supra.
Hillyard vs. N. Y. Mutual, 37 N. J., supra.

The plaintiff in error says, the contract made the insured a "quasi partner of the company." What is a "quasi" partnership? Is one "quasi" partner bound by the acts of the other? Can each use the firm's name? Is there any right of survivorship? Is individual property liable for the "quasi" debts? It can hardly mean that the company had as many separate "partnerships" on hand as there were policy holders, or that it and each individual holder constituted a firm for the insurance of all the rest. Yet if each policy holder was a "partner of the company," each policy established a separate partnership.

If there was any "partnership" between the policy holders, as among themselves, it existed *in*, and *was*, the corporation, and the members of the corporation were the members of the partnership. In that case, the charter constituted the articles of co-partnership, and the corporation was the firm. There could be no such thing as a partnership *outside* of the corpora-

tion, or supported by any thing else than the articles of co-partnership, i. e. the charter.

If then this mutual company were a "partnership," subject to dissolution in the event of a war, which divided its policy holders, *what became of the corporation*, during the late war? If it were *dissolved* as to its *Southern policy holders*, it was dissolved as *to all.* If a partnership be dissolved as to one member, it is dissolved as to the whole firm, and the remaining members must start a new one—and so, if this corporation was dissolved, or "revoked," as to its southern members, by the war, it was *dissolved as to all*, and has had no legal existence since April 27th, 1861, and consequently, no standing, at this moment, in this Court.

But whatever be the relation of policy holders in a mutual company to the corporation, they are, as to their policies, mere individual parties to a contract with it. A firm of course can make a contract with one of its partners—or a corporation with one of its members, e. g. a lease, with the usual conditions on non-payment of rent. Whether any given contingency affected the partnership or corporation, would not be a question affecting the lease; nor would any contingency affecting the lease, involve the existence of them; and so, the relations of policy holders to the mutual company, and their rights under their policies, are perfectly distinct, and neither involve the other. Or, if the insured was in any sense a partner, let the "quasi partnership" *be dissolved;* the specific contract is clear of any entanglement.

The case of Deale, 18 Md., 26, cited by plaintiff, does not decide that the insured, in a mutual company, is a partner.

That case, on a question of misrepresentation as to title, under a fire policy, holds that the insured was a member so as to be bound by the charter, constitution and by-laws, because "his assent to them was expressed in his application; they were incorporated in the policy, and became a material part of the contract." The term "partner" is not to be found in the case.

Though the insured is a partner under neither, the distinctons between a fire and life policy in a mutual company are

very clear. Under a life policy there are no assessments; no membership, or continued liability to assessments, after loss; no lien; no return of any unexpended premium, &c. In respect to the nature of the contract, they differ, in that the life policy is an entire contract, needs no renewals, is not a contract of indemnity, the ultimate loss is certain, the interest of the insured increases year by year, as life advances, &c. These differences arise from the intrinsic character of the subject matter insured, and from the fact that in a mutual fire company, the charter and constitution are made part of the contract.

"NOTIFICATION" OF THE INSURED'S "ELECTION."

II. The plaintiff here, in another proposition, claims that the period of payment of each successive premium was a sort of renewal period, and that the company was entitled, under the policy, to a "notification" of the assured's "election to continue it."

What sort of a "partnership" would it be, the continuance of which depended upon "notifications" every three months from each of many thousand members of the firm, of his "election to continue it?"

The propositions of the plaintiff in error kill each other. But, in this connection, payment of the premium is the only condition of the policy; "notification" to the company is not within its terms. Suppose the case of a lease for ninety-nine years, to be void if the rent were six months' in arrear—would it be annulled by war?—or would it be avoided because the lessee did not send through the lines of the army a "notification" of his "election to continue it?" If the lessor had an agent within the lessee's country, would not payment to such agent be sufficient, although the lessor received no "notification" thereof?

But whether the plaintiff in error was entitled to "notification," or the assured required every three months to make an "election," or not, such notice of election, if essential, was, under the terms of contract, to be given in Virginia, and the Company was bound to have an agent there to receive it.

IV. If this Court thinks a federal question was involved, and incorrectly decided, it is submitted that the decision thereof

was not necessary to the judgment rendered, and that there is other matter in the case broad enough to maintain the judgment.

The plaintiff in error concedes, that the Court's opinion was based "upon the single fact * * that there was no agent to receive payment of premiums in any manner."—brief, p. 5.

The defendant in error has endeavored to show, that the decision of the Court, to the effect that the company was bound to have an agent in Virginia, was made in the construction of the policy as a Virginia contract—"a local transaction"—and under the *terms of the contract*, independently of any then operation of the Statute. Should this Court think, however, that a reference to the Statute, merely in aid of an illustration of the Court's reasoning, amounted to a decision on the Statute, it is nevertheless clear that the Court decided the same thing under the terms of the contract, and that decison was broad enough to maintain the judgment, and no decision of the Statute was necessary.

Murdock vs. Memphis, 20 Wall., 590.
Bolling vs. Lersner, Dec. Term, 1875.

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